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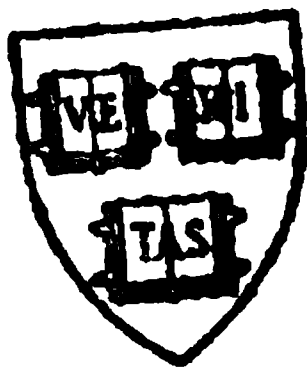
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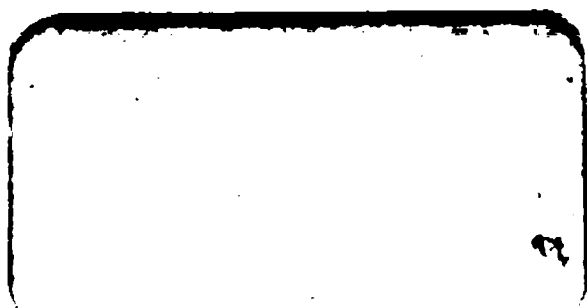
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VOL. 10—INDIANA REPORTS.

INDIANA REPORTS.
VOL. X.

Indiana. Supreme court

REPORTS ^{cf}

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE ¹²

OF THE

STATE OF INDIANA



WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY GORDON TANNER,

OFFICIAL REPORTER.

VOL. X.

CONTAINING THE CASES FROM THE SEVENTEENTH DAY OF THE NOVEMBER TERM, 1857, TO THE END OF THE MAY TERM, 1858.

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J U D G E S
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA.
DURING THE PERIOD COMPRISED IN THIS VOLUME.

SAMUEL E. PERKINS,
ANDREW DAVISON,
WILLIAM Z. STUART,*
JAMES L. WORDEN,†
JAMES M. HANNA.‡

Judge WORDEN was Chief Justice at the *May* term, 1858.

* Judge STUART's last opinion was delivered on *Saturday*, the 2d of *January*, 1858.

† Judge WORDEN's first opinion was delivered on the first day of the *May* term, 1858.

‡ Judge HANNA's first opinion was delivered on *Friday*, *December* 25, 1857.

For previous decisions of the Supreme Court of this State, overruled in this volume, see
INDEX, tit. CASES OVERRULED, &c.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1857, IN THE FORTY-
SECOND YEAR OF THE STATE.

MADISON AND INDIANAPOLIS PLANKROAD COMPANY v.
STEVENS.

[10 1
139 407]

One cōobligor may, it seems, deliver a bond to another cōobligor, as an escrow; but the delivery of an instrument to an obligee or payee, or the agent of either, is absolute in law.

Parol evidence is not admissible to vary the legal effect of such delivery, or the terms of the instrument delivered.

APPEAL from the *Decatur* Court of Common Pleas. *Monday, December 14.*

PERKINS, J.—Suit upon a subscription of stock. Answer, under oath, that the subscription was delivered to *Alexander Washer*, as an escrow.

Reply, that *Alexander Washer*, to whom the delivery was made, was at the time the president of the company in which the stock was subscribed, and the agent to receive the subscription. Upon the trial, the plaintiff asked the Court to give to the jury this instruction:

“If the jury believe from the evidence, that said *Alexander Washer* was the president and agent of the company for the purpose of receiving subscriptions of stock, at the time when the parol agreement for the delivery of

Nov. Term, 1857. the subscription of stock was made by said defendant, then the delivery [which followed] was absolute, and the

MADISON AND INDIANAPOLIS RAILR'D CO. instrument valid."

v.
HEROD.

The Court refused the instruction, and gave the contrary. In this, the Court erred.

One cöobligor may, perhaps, deliver a bond to another cöobligor, as an escrow; but an instrument cannot be so delivered to the obligee or payee, or the agent of either. Such delivery is, in law, absolute. Pet. U. S. Digest, tit. Escrow.—*Foley v. Cowgill*, 5 Blackf. 18.—*The State v. Chrisman et al.*, 2 Ind. R. 126.—*Wright v. The Shelby, &c., Company*, 16 B. Mon. 5. See 7 Ind. R. 600; 6 *id.* 183; 9 *id.* 25.

And parol evidence cannot be given to vary the legal effect of such delivery, or the terms of the instrument delivered. This has been too often decided to require a citation of authorities to evidence it. *Hiatt et al. v. Simpson*, 8 Ind. R. 256.

Per Curiam.—The judgment is reversed with costs. Cause remanded for a new trial.

J. Gavin, J. R. Coverdill, and O. B. Hord, for the appellants (1).

J. Ryman, for the appellee.

(1) Counsel for the appellants cited, *Fairbanks v. Metcalf*, 8 Mass. R. 238; *Ward v. Lewis*, 4 Pick. 520; *Worrall v. Munn*, 1 Selden, 238; 10 Wend. 313; 23 Wend. 45; *Railsback v. The Liberty, &c., Turnpike Company*, 2 Ind. R. 656; *The State v. Chrisman*, *id.* 126; *Madison and Indianapolis Plankroad Company v. Stevens*, 6 *id.* 379—the case now at bar; *Wright v. The Shelby Railroad Company*, 16 B. Mon. 5.

MADISON AND INDIANAPOLIS RAILROAD COMPANY v. HEROD.

In a suit against a railroad company for damages for injuring cattle, the witnesses estimated the value of the property variously, from 30 dollars to 40 dollars. *Held*, that the Court might find the value to be 37 dollars. Section 3, ch. 93, Acts of 1853, is unconstitutional.

APPEAL from the *Bartholomew* Circuit Court.

Nov. Term,
1857.

STUART, J.—Suit by *Herod* against the railroad company, for damages in injuring *Herod's* colt. Judgment before the justice in favor of *Herod* for 37 dollars. The railroad company appealed to the Circuit Court. The cause was there tried without a jury, and judgment given for *Herod* for 37 dollars, the injury to the colt, 37 dollars in damages, and 5 dollars docket-fee. Motion for a new trial, interposed at the proper time, overruled, and the evidence made part of the record.

BRONSON
v.
HICKMAN.

Monday,
December 14.

The injury done to the colt was variously estimated by the witnesses at from 30 dollars to 40 dollars. The Circuit Court, as they had a right to do, placed it at 37 dollars. The 37 dollars in damages, and the 5 dollars docket-fee were assessed by the Court under the third section of the act of *March 1, 1853*. Laws of 1853, p. 113. That section has been declared unconstitutional in the *White-neck* case, 8 Ind. R. 217. Though the Court were not agreed as to the grounds on which the decision should be placed, they were unanimous in the result, that the section in question was clearly a violation of the constitution.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Herod and *S. Stansifer*, for the appellant.

R. Hill, for the appellee.

BRONSON v. HICKMAN.

Where a motion for a new trial has been overruled, this Court will not interfere with the verdict on the ground that it is not sustained by the evidence, except in extreme cases.

To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence is not merely cumulative; that it was discovered after the trial; that there was no want of diligence; and that it would probably change the result.

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v.
HICKMAN.

Monday,
December 14.

APPEAL from the *Allen* Circuit Court.

STUART, J.—The cause was commenced by *Hickman* against *Bronson*, before a justice, where the plaintiff had judgment for 53 dollars and 81 cents. On appeal to the Circuit Court, *Hickman* had judgment for 50 dollars. The motion for a new trial, assigning for cause the insufficiency of the evidence, and newly discovered evidence, was overruled.

The evidence in the cause is made part of the record in proper form.

The same causes are assigned for error, which were assigned for a new trial.

The first, viz., the insufficiency of the evidence, cannot be noticed. There is no such glaring insufficiency of proof as would justify this Court in interfering with the verdict, sanctioned, as it has been, by the action of the Court below in overruling the motion for a new trial. This has long been the settled rule in this Court. *Mann v. Clifton*, 3 Blackf. 304.—*Watson v. Allen*, 4 Ind. R. 537 (1).

The second point made, viz., the newly discovered evidence, presents more difficulty. The judgment recovered was 50 dollars. The defendant below produced his own affidavit, and the affidavits of two other witnesses, agreeably to the rule as heretofore held by this Court. 4 Blackf. 308.—*Priddy v. Dodd*, 4 Ind. R. 84. Nothing was wanting in point of form.

The only question is as to the substance. The newly discovered evidence should seem obviously sufficient to change the result upon a new trial. *Hull v. Kirkpatrick*, 4 Ind. R. 637. Nor where the evidence is merely cumulative will a new trial be granted. *Jennings v. Loring*, 5 Ind. R. 250.—*Simpson v. Wilson*, 6 *id.* 474. In this latter case it was held, too, that the evidence must have come to his knowledge after the trial; that it must appear that its discovery so late was not owing to a want of diligence; and that it would probably produce a different result (2).

Tested by these rules, we think the party entitled to a new trial. There are two witnesses to the same fact. Both swear that they heard the plaintiff below admit, just

before the trial, that the defendant below owed him justly about ten or twelve dollars; and that they did not communicate this admission to the defendant below until after verdict. We cannot say what effect this would have had on the jury. But in weighing it here with reference to the party's right to a new trial, we must look at the evidence in the cause. That consisted almost entirely of vague admissions of the defendant below. The jury might have regarded the admissions of the opposite party, so far as they went, a sufficient answer. And as these witnesses appeared to the Court below, or as they appear to us, it is not easy to see how anything is to be presumed against their credibility.

We, therefore, think the newly discovered evidence material, and likely, in the state of the evidence presented by the record, to have changed the result. Nor does it appear that there was any negligence in discovering it; or that any degree of diligence could have ascertained it sooner.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. C. Jacoby, for the appellant.

D. H. Colerick, for the appellee.

(1) *Roberts v. Nodwift et al.*, 8 Ind. R. 339.—*Gibson v. The State*, 9 *id.* 264.

(2) *Gibson v. The State*, 9 Ind. R. 264.—*Swift v. Wakeman*, *id.* 552.

MULLINIX v. THE STATE.

Error cannot be assigned upon any ruling in a criminal prosecution, which was not made the subject of an exception in the Court below, according to the statute.

APPEAL from the *Putnam* Circuit Court.

Monday,
December 14.

Per Curiam.—*Greenberry O. Mullinix* was indicted for the murder of *Martha Mullinix*, his wife. The indictment charges him with murder in the first degree. Verdict that

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he was guilty, and that he suffer death; upon which the Court, having refused a new trial, rendered judgment.

The record does not contain the evidence, nor does it appear that any exception was taken to the action of the Circuit Court; and, though various errors have been assigned for the consideration of this Court, the question at once arises, is the case properly before us? The code says that, "on the trial of a criminal prosecution, exceptions may be taken by the defendant to any decision of the Court upon a matter of law, by which his substantial rights are prejudiced." Again—"All bills of exception in a criminal prosecution must be made out and presented to the judge at the time of trial, or within such time thereafter during the term, as the Court may allow, signed by the judge, and filed by the clerk. The exception must be taken at the time of the decision." 2 R. S. pp. 377, 378. In relation to the mode of taking exceptions, the above provisions establish a rule of practice not essentially dissimilar to that prescribed in civil cases. *Id.* pp. 115, 116. And we have often decided that that which is not made the subject of an exception in the Court below cannot be assigned for error in this Court (1).

It is said that this being what is denominated a "capital case," the rule to which we have referred should be relaxed; but the position thus assumed is unsustained by principle or authority. The statute, so far as it allows exceptions to be taken, creates no distinction between the offense charged in this case, and one of lower grade. It is needless for us to inquire what this Court would do, if the record contained the evidence, showing the accused guiltless of the crime of which he stands convicted. Such, however, is not the case at bar. What we decide is, that there being no exceptions to the rulings of the Circuit Court, the errors assigned are not available in the Supreme Court; and, in the absence of the testimony given on the trial, we must presume that the verdict was sustained by the proofs. *Hornberger v. The State*, 5 Ind. R. 300.—*Romaine v. The State*, 7 *id.* 63.—*Ward v. The State*, 8 Blackf. 101.—*Bland v. The State*, 2 Ind. R. 608.

The judgment is affirmed with costs.

R. L. Walpole and T. D. Walpole, for the appellant.

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(1) See *Zehner v. Beard*, 8 Ind. R. 96; *Jolly et al. v. The Terre Haute Draw-bridge Company*, 9 id. 417, and the cases there cited.

VAWTER v. GRANT and Another.

APPEAL from the *Jennings* Court of Common Pleas.

Monday,
December 14.

Per Curiam.—*Grant* and *Fisk* sued *Vawter* in the Common Pleas, demanding judgment for 1,000 dollars.

In *Fisher v. Prewitt*, 7 Ind. R. 519, the majority of the Court held that the Common Pleas Court had no jurisdiction of such a sum. A majority of the Court hold the same doctrine now—STUART, J., dissenting.

The judgment is reversed with costs. Cause remanded, with instructions to dismiss it for want of jurisdiction.

J. W. Chapman, J. B. Merriweather, D. M' Donald and *A. G. Porter*, for the appellant.

H. C. Newcomb and *J. S. Harvey*, for the appellees.

JOHNSON v. HATCH and Another.

APPEAL from the *Wayne* Circuit Court.

Monday,
December 14.

Per Curiam.—This was a suit upon two promissory notes, brought by the appellees, who were the assignees of the notes, against the maker. The notes were payable at the *Cambridge City* bank. The defendant, in his answer, sets up failure of consideration, and therein alleges the grounds upon which such failure is based. Demurrer to the answer sustained, and judgment for the plaintiff.

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ROBERTSON.

The defendant appealed to this Court, and assigns for error the action of the Circuit Court in sustaining the demurrer; but to this ruling he took no exception, and we have often decided that that to which no exception is taken in the Court below, cannot be assigned for error in the Supreme Court (1).

The judgment is affirmed with 7 per cent. damages and costs.

G. W. Julian, for the appellant.

— *Burchenal*, for the appellees.

(1) See *Mullinix v The State*, ante, 5, and note.

HAMILTON v. THE STATE.

Monday,
December 14.

APPEAL from the *Warren* Circuit Court.

Per Curiam.—The judgment in this case is affirmed for the reasons given in *Gillespie v. The State*, at the present term (1).

The judgment is affirmed with costs.

R. A. Chandler, for the appellant.

J. W. Gordon, for the state.

(1) 9 Ind. R. 380.

EARNHART v. ROBERTSON.

A defendant may answer an interrogatory demanding whether he has a receipt for money paid, without making the receipt an exhibit.

But if the receipt be made an exhibit, and there be no reply under oath, its execution stands admitted; but still it may be gainsayed for fraud or mistake.

Where there was no reply to the answer to a bill, but the parties, by consent, submitted their cause upon the pleadings and evidence as they stood, the Court will intend that the filing of a reply was waived, and that the cause stands at issue on bill and answer, as though a general replication had been filed.

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ROBERTSON.

Evidence admitted under such issue without objection, if consistent with the case made by the bill, may have its full weight in determining the cause.

A suit is not barred by the statute of limitations where the cause of action is concealed by the person liable thereto, until within the period limited. For certain acts amounting to a concealment, see the opinion.

An attorney in fact cannot set up, in defense of a suit against him, transactions unauthorized by his power, and not within the scope of his employment.

APPEAL from the *Sullivan* Circuit Court.

Monday,
December 21.

DAVISON, J.—Bill in chancery, filed *January* 15, 1851.

The bill contains the following statements:

In the year 1841, *Catharine Robertson*, the plaintiff below, employed *John Earnhart*, who was the defendant, to collect a sum of money, supposed to be 900 dollars, coming to her from the estate of her father, who died in *Virginia*. She gave him a power of attorney to collect and receipt for the money; and in the year 1842, he, defendant, went to *Virginia* for the purpose of collecting it, with the express understanding that, when collected, he was to retain 100 dollars as a full compensation for his time, services and expenses, also 200 dollars which he was to apply in payment of a debt due to him from her son, *John Robertson*, and upon his return, he was to pay over the balance to the plaintiff. As her agent, he collected 682 dollars, as follows: From *Samuel Kinnerly*, *January* 13, 1842, 50 dollars; from *Jacob Kinnerly*, *February* 11, same year, 149 dollars; from *Samuel Kinnerly*, *September* 1, 1842, 83 dollars; and from same, *November* 30, same year, 400 dollars. Defendant, when he returned from *Virginia*, called on the plaintiff and told her that he had collected 300 dollars and no more. As that was the amount of money which he was to retain, she felt satisfied, though she expected a larger sum. Defendant was a preacher. Plaintiff belonged to his church, and employed him to collect her money because, on account of his religious professions, she had confidence in him. In the latter part of the year 1846, the

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plaintiff, in consequence of information from *Virginia*, was induced to believe that the defendant had collected more than 300 dollars, and having inquired of him whether her belief was well founded, he again stated that he had collected 300 dollars and no more. The plaintiff, in *June*, 1847, got copies of receipts, given by the defendant for moneys collected in *Virginia* as her agent, which showed that, instead of 300 dollars, he had collected 682 dollars. And when called on and informed that such copies had been obtained, he still denied the receipt of more than 300 dollars, and up until very lately continued to make such denial. Defendant now pretends that he holds plaintiff's receipt for all the moneys claimed in this suit. He drew all the writings between them relative to the business in which he was employed. She does not remember what papers she signed. He never paid her anything; and if he holds her receipt for money paid, it is a forgery. The bill calls upon the defendant to answer various special interrogatories, and among them the following: How much money did you receive on plaintiff's claim in *Virginia*? and from whom? Have you any receipts for money paid to the plaintiff?

The defendant's answer, which is verified by his oath, denies the contract, as set forth in the complaint; says that, on the 17th of *October*, 1839, defendant sold a farm in *Washington* county, *Indiana*, to *John Robertson*, the plaintiff's son, who, with his own means, was unable to pay for it, and that *John* and his mother represented that she had money coming to her in *Virginia*, from the estate of her father, upwards of 300 dollars with interest, whereupon it was agreed between the parties that defendant should have the plaintiff's *Virginia* claim of 300 dollars, and *John's* promissory notes for 900 dollars for the farm; that he was to have all of said claim he could recover, more or less, and run the chance of making himself safe out of it. That defendant, upon his return from *Virginia*, called upon the plaintiff, who gave him the following receipt: "*January* 26, 1844. Received in full of *John Earnhart*, my attorney, the full amount coming to me from the

estate of my father, *James Kinnerly*, deceased. Attest: *John Robertson*. [Signed] *Catharine Robertson*." Defendant denies saying that he had collected but 300 dollars; says that, upon his return from *Virginia*, he told her that he had succeeded in settling the claim—that he had, in a manner, collected the principal sum and interest, subject to deductions for costs and expenses; does not pretend that he paid anything to the plaintiff, but alleges that the receipt was executed by her voluntarily, with a full knowledge of the facts, in order to prevent all misunderstanding, and show a final settlement of the business. He admits that he gave the receipts referred to in the bill to *Jacob* and *Samuel Kinnerly*; but avers that, at the time of the institution of this suit, he had not collected 300 dollars in money, but the sum which he had got, and that which he expected to get, when added together would amount to about 425 dollars. The answer sets up the statute of limitations in bar of the suit.

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There is no replication to the answer. At the *March* term, 1853, the cause, by agreement of parties, was submitted for final decree. The Court found for the plaintiff; and, over a motion for a new trial, rendered a decree in her favor for 682 dollars.

This, as we have seen, was a suit in chancery. Issues were made, and the cause submitted to the Court for trial, under the old system of procedure. And the evidence is in the record in the form of depositions. The first question raised by the defense, relates to the contract sued on. What are its stipulations? The bill says that the defendant, when he collected the money, was to retain 300 dollars, and, upon his return from *Virginia*, pay over the balance to the plaintiff. This averment the answer denies, and such denial, being responsive to the bill, is evidence in the case. Three witnesses, *Mallet*, *Robertson* and *Boyle*, each fully sustain the alleged contract, and two of them, *Robertson* and *Boyle*, testify that they were called on by the parties to witness it. On the other hand, *Elisha* and *Caroline Earnhart*, the defendant's son and daughter, testified to various conversations of the plaintiff, in which,

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they say, she admitted that the defendant "was to have all of the *Virginia* claim he could recover, and run his chance of making himself safe out of it." We have, however, carefully examined the depositions, and are of opinion that the evidence, giving due force to the answer, sufficiently proves the contract stated in the bill.

But it is insisted that the receipt set up in the answer is a conclusive defense; that the defendant was called upon to produce it, and having produced it, the same not being denied under the plaintiff's oath, stands admitted and cannot be gainsayed. This conclusion is not strictly correct. The defendant was not called upon to produce the receipt, but was simply interrogated whether he had any receipts for money paid by him to the plaintiff. It was obviously competent for the defendant, had he chosen to do so, to have answered the interrogatory without making the receipt an exhibit in defense of the suit. Its execution, however, does stand admitted. The defendant was not bound to prove that the plaintiff signed it, because there was no reply verified by oath denying her signature. Still there is no reason why the receipt cannot be gainsayed. For instance, it might be avoided on the ground of fraud or mistake, though not denied under oath. It appeared in evidence that the receipt in question was written by the defendant, who, at the plaintiff's request, signed her name, and that *John Robertson*, who is a witness in the cause, attested its execution. The testimony of *Robertson* shows conclusively that when she gave the receipt she was insane, and incapable of transacting any business. But such evidence, it is said, should not have been allowed any consideration in the decision of the case, because there is no issue to which it was applicable. It is true, there was no reply to the answer. Still the parties, by consent, submitted their case upon the pleadings and evidence, as they then stood. Hence, we must intend that the filing of a reply was waived by the defendant. *Demaree v. Driskill*, 3 Blackf. 115. The case, therefore, stands at issue on bill and answer, as if a general replication had been filed. R. S. 1843, p. 837, § 30. And under such replication, it

seems to us, it was competent for the plaintiff to show that she was insane when she gave the receipt. At all events, the evidence was admitted under issues made by the parties, without objection—was not inconsistent with the case made by the bill—and we are not, therefore, inclined to hold that the Court erred, in giving it the effect of legitimate proof.

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ROBERTSON.

The next question to settle is, was the suit barred by the statute of limitations? It is conceded that the defendant returned from *Virginia* on the 26th of *January*, 1844, and that previously he had given receipts for 682 dollars, the entire amount to which the plaintiff was entitled from the estate of her father. The evidence, we have seen, shows that under his contract he was bound, after retaining 300 dollars out of the amount for which the receipts were given, to pay over, when he returned, the balance, to the plaintiff. But he failed to make such payment; and the result seems to be that, for his default, an action in her favor accrued at the date of his return. And as the present suit was not commenced until the 15th of *January*, 1851, the defense must be sustained, unless the statute itself contains an exception applicable to the case made by the record, which takes it out of the general statutory rule. We are referred to section 113 of that statute, which says: "If any person liable to any of the actions mentioned in this article, shall conceal the cause of such action against him from the knowledge of the person entitled thereto, the action may be commenced at any time within the period limited therefor, commencing from the time the person entitled to bring the same shall discover that he has such cause of action," &c. R. S. 1843, p. 688. Did the defendant, in this instance, conceal the cause of action? And if so, was the plaintiff unadvised of her right to sue until within the period of six years next before she instituted her suit? The bill charges that the defendant, when he returned from *Virginia*, and at various times thereafter up until shortly before the suit was commenced, told the plaintiff that he had collected 300 dollars and no more. This charge the answer denies. What, then, are the proofs?

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Robertson, a witness, testified that he was the agent of the plaintiff, who was his mother; that defendant, upon his return from *Virginia*, told witness that he had collected only 300 dollars; that he also made a similar statement to plaintiff at the time she gave the receipt, as before stated; that she belonged to the same church in which he was a preacher, and had great confidence in him.. *Robertson* further stated that plaintiff, when defendant returned, was incapable, on account of mental derangement, of transacting any business; that she was insane for the space of two or three years, and became sane in the spring of 1845, and in that year, or the year 1846, got a letter from her brother, stating the amount defendant had collected. This, in our opinion, shows an intentional concealment within the meaning of the statute, and admits the decisive inference that plaintiff did not discover her cause of action until the spring of 1845. It follows, in view of *Robertson's* testimony, that the statute did not commence to run until the latter period, and that the suit is not barred, because, as we have seen, it was instituted on the 15th of *Jannary*, 1851.

Boyle, another witness, testified that on defendant's return from *Virginia*, he asked him how much he had collected for plaintiff, but he did not seem disposed to tell the amount. He stated that he got enough to make him safe, and he was satisfied. This evidence, though it does not amount to a representation, or prove a concealment from the plaintiff, tends to show an intent to conceal his liability on the contract, and, being unexplained, must be regarded a circumstance corroborating the direct testimony of *Robertson*. Indeed, the very fact that defendant set up in his defense a claim to all the money which he had collected, when by the contract he was only entitled to 300 dollars, conduces to prove that at the time he evaded *Boyle's* inquiry he had conceived the design of concealing the plaintiff's cause of action. We are of opinion that the defense of the statute of limitations is not sustained by the evidence.

But it is insisted that the decree is for an amount unau-

thorized by the proofs. The answer, though it admits that defendant, as agent, gave receipts for 682 dollars, as stated in the bill, alleges that a portion of the amount for which they were given was paid to him in promissory notes, in articles of personal property, and in claims against the plaintiff; and that in settling the business, he had expended a large sum in attorney's fees and costs, so that, at the commencement of this suit, he had not realized, in money, more than 300 dollars. The admission of the receipts is responsive to the bill, and, therefore, evidence in the case; but the answer, so far as it avers payments to the defendant otherwise than in money, and the expenditure for attorney's fees, &c., should have been, but is not, sustained by proof. Suppose, however, that the answer, in that respect, be taken as true, still the defendant was employed to collect money, and not authorized to receive in payment anything but money. For his services and expenses in making such collection, he was to receive 100 dollars, and no more; and he cannot be allowed to set up in defense of the suit, transactions unauthorized by his engagement and not within the scope of his employment. The 682 dollars stated in the receipts, must be considered a proper estimate of the amount which the defendant was employed to collect, out of which, in accordance with the contract, he was authorized to retain 300 dollars. The balance, 382 dollars, with the addition of interest from the date of his return from *Virginia*, makes the decree. We think the amount due the plaintiff was correctly estimated.

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V.
ROBERTSON.

Per Curiam.—The decree is affirmed, with 5 per cent. damages and costs.

J. P. Usher, for the appellant.

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GILBERT
v.
CARTER.

GILBERT v. CARTER.

Where a bidder at sheriff's sale prevents others from bidding, by representations touching the object of his bid, and buys the property at a price much below its value, the sale is void, as against public policy.

But where no person was influenced by such representations, except the attorney of the execution-plaintiff, and it did not appear that he would have bid more than enough to cover the debt, a sale for the amount of the debt was held valid, though that amount was much less than the value of the property.

The representation in this case was, that the bidder wished to purchase the property for the use of the execution-defendant and his family; but the statement was not reduced to writing. There was no contract or understanding between the purchaser and the execution-defendant, nor did the latter advance any part of the purchase-money, nor was there any proof of fraud. *Held*, that no trust was created.

Monday,
December 21.

APPEAL from the *Delaware* Circuit Court.

DAVISON, J.—This was a suit in chancery, under the old system of procedure. The facts stated in the bill, answer and depositions, so far as they relate to the material questions in the case, are as follows:

At the *September* term, 1840, *E. and P. Frost* recovered a judgment in the *Delaware* Circuit Court, against *Gilbert*, for 129 dollars. An execution was issued on this judgment, and by virtue of it, a lot of ground in *Muncie*, on which was a tavern stand, was advertised to be sold on the 21st of *December*, 1840, by the sheriff, as the property of *Gilbert*. On the day of sale, *Carter*, who was *Gilbert's* son-in-law, called upon *Jacob B. Julian*, the attorney for the execution-plaintiffs, stated that it was a hard case to have *Gilbert* and his family turned out of it, and proposed to buy the lot for their use, provided he could have time for a part of the purchase-money. *Julian* then said it was money, and not property, his clients wanted; and upon the repeated representations of *Carter*, that he had no desire to reap any advantage from the purchase, but would buy the lot for *Gilbert* and his family, he, *Julian*, acceded to the proposition; and believing the representations to be true, was induced not to bid at the sale, and to allow *Carter* to bid off the property, which he accordingly did at the price of 129 dollars, the amount of the judgment; and *Carter*, hav-

ing received a sheriff's deed pursuant to the sale, paid *Julian* 50 dollars in hand, and gave his promissory note for 79 dollars, the residue, and executed a mortgage on the property to secure the payment of the note. This was, in substance, all the evidence relative to *Carter's* purchase of the lot.

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CARTER.

The bill prayed that *Carter* be compelled to convey the property to *Gilbert*, and for general relief, &c. Upon final hearing, the Court dismissed the bill.

The decision of the case at bar depends upon the solution of this inquiry—Was the sheriff's sale valid? If it was, the decree of the Circuit Court must be sustained.

The rule is that where a bidder at sheriff's sale prevents others from bidding, by representations respecting the object of his bid, and then buys the property at the sale at a price much below its value, the sale is void, as against public policy. 7 Blackf. 268.—5 Ind. R. 232, 487.—6 *id.* 448.

As we have seen, *Carter* bought the property for 129 dollars, the full amount of the judgment; but it is not shown that any person other than *Julian* was influenced by the representations. Nor does it appear that he would have bid more than enough to cover the entire debt. This he may have intended to do, in discharge of a duty to his clients; but the facts proved will not allow the inference that he would have done anything more. The sale, then, so far as the representations affected the bidding of *Julian*, stands as it would have stood had they never been made. He said his clients did not want the property. The agreement to give time for a part of the purchase-money, may have been induced by the representations; but there is nothing in the evidence tending to prove that in their absence the property would have sold for any advance on the amount at which it was bid off by *Carter*.

It follows that the rule to which we have referred does not apply to the case before us; and the sheriff's sale must, therefore, be held valid.

This leads us to inquire whether *Carter*, in respect to the property, became a trustee of the plaintiff. The statement that he would buy the lot for the use of *Gilbert* and

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his family, was not available as an express trust, because it was not reduced to writing. Nor is this a case of resulting trust; because the sheriff's sale was valid. In relation to the purchase, no contract or understanding appears to have existed between *Carter* and the plaintiff. He advanced no part of the purchase-money; nor does he appear to have been the victim of any fraud. *Irwin v. Ivers*, 7 Ind. R. 308.

In our opinion, the decree should be affirmed.

STUART, J., dissented.

Per Curiam.—The decree is affirmed, with costs.

ROSE and Others v. BATH TOWNSHIP and Another.

Section 9 of the school law of 1855, empowering township trustees to raise taxes to build school-houses, is constitutional.

The power must be exercised strictly within the statutory limits.

Monday,
December 21.

APPEAL from the *Franklin* Circuit Court.

STUART, J.—This case presents a similar question to that raised in *Adamson v. The Auditor, &c.*, at the last term (1).

It is insisted that the ninth section of the school law of 1855, empowering the trustees to levy a tax in their respective townships for the construction and repair of school-houses, &c., not exceeding twenty-five cents on the one hundred dollars, is unconstitutional and void. On that hypothesis an injunction had been granted by the clerk in vacation, which the Circuit Court dissolved at the next term, thus sustaining the constitutionality of the law of 1855. *Rose* and others appeal.

This identical question has been several times before the Court, and the constitutionality of the section in question sustained. It would be remarkable indeed, if a constitution which so strongly favors education, should be

found in practice, to obstruct and bar the very first step towards giving it effect. In *Greencastle v. Black*, 5 Ind. R. 557, it is held that the townships cannot levy a local tax for the support of the common school system of the state; for the constitution provides that common schools, as to tuition, must be supported by state tax. The tax to build school-houses, so far as it was provided for in the same section, being inseparable from the other, fell with it.

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V.
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SHIP.

But, in the same opinion, the theory of this ninth section was distinctly stated. Thus, while voting a tax, was regarded as unconstitutional, it was said, "The theory of our constitution is representative. The people of the townships act by trustees or other local officers; the people of the county, by their county board; the people of the state, by the legislative, judicial and executive departments. Thus, the laws operating in counties and townships, become efficient commands and rules of civil action—not mere permissions, to be disregarded or otherwise, as the voters may choose to vote. In electing members of the general assembly, the people are all heard upon every question. The executive officers of the state, the counties and the townships carry out whatever general laws the wisdom of the assembly has devised. Thus, the people speak, but under the constitution, it is through their representatives." 5 Ind. R. 575.

Thus, the legislature has clothed the trustees with power to raise taxes and build school-houses, just as they have conferred power on counties, cities and townships in other respects. The power is to be exercised within the limits prescribed, viz., twenty-five cents on the one hundred dollars. Within these limits, it is as legitimately exercised as any power of taxation, not directly a state tax, and which must necessarily be left to the discretion of city, county or township officers.

The ninth section, *supra*, was directly passed upon in *Adamson v. The Auditor, &c.*, *supra*, and approved in *The Trustees, &c. v. Osborne*, at the present term (2).

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PARKS
v.
MARSHALL.

Per Curiam.—The judgment is affirmed with costs.

G. Holland, for the appellants.

J. D. Howland, for the appellees.

(1) 9 Ind. R. 174.

(2) 9 Ind. R. 485. See, also, *Quick v. Whitewater Township*, 7 Ind. R. 570; *Quick v. Springfield Township*, id. 636; *Jenners v. The City of Lafayette*, post.

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PARKS v. MARSHALL.

In a suit upon a promissory note payable in certain railroad scrip, where the maker had failed to pay in such scrip, the market value of the scrip is the measure of damages.

Monday,
December 21.

APPEAL from the Grant Court of Common Pleas.

STUART, J.—Suit on the following note: “\$400. Twelve months after date, I promise to pay *John M. Wallace* four hundred dollars, in *M. & M. V. Railroad* scrip, without any relief from valuation or appraisement laws” (Signed by the defendant, *Marshall*.) The note was assigned by *Wallace* to *Brownlee*, and by *Brownlee* to *Parks*.

There was a jury trial—verdict and judgment for the plaintiff for 249 dollars. *Parks* moved for a new trial, and appeals.

The measure of damages upon this note, is the only question in the case.

The Court instructed the jury that the value of the scrip at the time the note became due, was the measure of the plaintiff's damages.

Was this instruction correct?

There are several cases in our Reports bearing on this question. Let us first ascertain, as nearly as we can, how the several contracts were worded.

In *Coldren v. Miller*, 1 Blackf. 296, the notes were payable in current bank paper; and the value of such paper was held the measure of damages. The same doctrine

was held in *Van Vleet v. Adair*, 1 Blackf. 346. So upon a note for 30 dollars of canal money. *Columbia v. Amos*, 5 Ind. R. 184.

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1857.

PARKS
V.
MARSHALL.

In *Mettler v. Moore*, 1 Blackf. 342, the covenant was for 125 dollars, in whisky, to be delivered at a particular place. *Held*, upon default the plaintiff was entitled to the face of the note and interest. In *Mason v. Toner*, 6 Ind. R. 328, it was stipulated that the note might be discharged in notes on good men, due at the maturity of the note in suit. *Held*, that if not thus discharged at maturity it became a purely money demand. In 7 Blackf. 231, the defendants promised that on August 1, 1841, they would pay the plaintiff 2,000 dollars, or convey him certain land. *Held*, that up to that day they had the right to elect which they would do; if they failed to exercise that right, they became liable for the money. Accordingly, *Duerson v. Bellows*, 1 Blackf. 217 (1).

In the cases cited from 1 Blackf. and 5 Ind. R. *supra*, the bank paper and canal scrip were an issue authorized by law, and passing conventionally as money. Had this species of currency been tendered at the maturity of the notes, it would have satisfied their terms. Of course the value of such paper currency at the maturity of the notes, was the measure of damages.

But, in the case at bar, the issues of railroad scrip had no such conventional value. The issue of such scrip was wholly outside of the purposes of the corporation, and unauthorized by law. At best, it could only be regarded as the promissory notes of the company—not to be distinguished from the notes of individuals.

This case is also to be distinguished, perhaps, from *Mason v. Toner*, and others cited, in this: that in those cases the note was drawn, payable in money—with a supplemental agreement, forming but one contract, it is true, but yet distinct as parts, to the effect that the note might be discharged in something else than money, if paid at a specified time.

Upon the whole, the majority of the Court are inclined to hold the note in this case payable in scrip; and that in

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PARKS
v.
MARSHALL.

case of failure, the measure of damages was the market value of the scrip at the time.

The authorities in other states are somewhat conflicting. In *Edwards on Bills and Promissory Notes*, 723, the adjudications of several of the states, on notes payable in specific articles, are collected. But, in relation to cases like that at bar, where the article to be paid is bank notes or scrip in the similitude of bank notes, the author says, "There is a class of cases in which the rule as held in some of the states, [viz., the sum named in the note as the measure of damages,] might, if applicable, operate unjustly towards the party in default; as, when a note is made payable in greatly depreciated bank bills, being given for twice or three times the amount of the debt due. * * *

When a party gives his note, payable in depreciated currency, he declares in substance, that the nominal amount is not the true amount due." *Edwards on Bills, &c.*, 725. See, also, 2 *Pars. on Contr.* 432, 441, 490 and note *q*, and the authorities cited; *Smith v. Dunlap*, 12 Ill. R. 184; *Sedgw. on Dam.* 239, *et infra*.

But we prefer to place the decision on the earlier opinions of our own Court above cited. The doctrine there held, is supported by the class of authorities just referred to. Whether it is entirely free from objection on principle, it is now too late to inquire. It has been so long established and acted upon, that it would be mischievous to unsettle it, even if it could be successfully assailed on principle. In relation to a great majority of legal questions, stability is preferable to change.

If parties would avoid the effect of such a principle, they must, as is done in *Mason v. Toner*, or in some other appropriate terms, make their contract definite, and thus leave no room for construction.

Per Curiam.—The judgment is affirmed with costs.

J. Brownlee, for the appellant.

I. Van Devanter and *J. F. McDowell*, for the appellee.

(1) See, also, 1 Gall. 388, 400; Doug. 14; 2 Ev. Poth. 46, 47.

CHAPMAN v. CLEVINGER.

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1857.CHAPMAN
v.
CLEVINGER.

The issue joined in a justice's Court remains in the Circuit Court on appeal. Application to set aside a judgment, on the ground that the party did not know that it was rendered against him. He was present at the trial, and on the return of the verdict moved for a new trial and in arrest of judgment, and no reason appeared for his ignorance. *Held*, that there is nothing in the case.

APPEAL from the *Wells* Circuit Court.Monday,
December 21.

PERKINS, J.—An action for the recovery of personal property, was brought before a justice of the peace. Judgment on appeal in the Circuit Court for the defendant, and for the value of the property not returned by the plaintiff. Motion for a new trial overruled. No exceptions taken in the case.

At a subsequent term, the defendant filed an application to be relieved from said judgment, under section 99, 2 R. S. p. 48.

Demurrer to his application sustained, and final judgment against him.

He claimed that the judgment should be set aside, because the trial of the appeal case in the Circuit Court was without an issue, no answer having been filed. A trial without an issue is undoubtedly erroneous. It is a *mis-trial*. *Wilbridge v. Case*, 2 Ind. R. 36. But, in the case at bar the error did not exist.

The statute puts in the general issue or denial, except *non est factum*, in cases before a justice of the peace, without its being specially pleaded, and that issue remains in the Circuit Court on appeal. 2 R. S. p. 455, § 34.—*Kinch v. Weatherall*, 2 Ind. R. 226.

The only ground taken in the application for setting aside the judgment is, that the party did not know that it was rendered against him. The record shows that he was present at the trial, and on the return of the verdict against him, moved for a new trial and in arrest of judgment, and discloses no reason why he did not know that the judgment was against him.

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1857.

There is nothing in the case.

HENDERSON

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

v.
HALLIDAY.

J. P. Green, for the appellant.

HENDERSON and Another v. HALLIDAY.

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102 139

Until error is assigned, a case is not in the Supreme Court for any purpose whatever.

And where error is assigned, if there be no brief in the case, it may be regarded as waived.

Monday,
December 21.

APPEAL from the *Fountain* Circuit Court.

PERKINS, J.—Suit to recover an account. Answer and reply. Jury trial, and judgment for the plaintiff. We have carefully looked through the case and discover no error that could reverse it, were any presented for the consideration of the Court. But there are none.

There is no assignment of errors. Hence, we have no jurisdiction of the case. The assignment of errors is the cause of action in this Court, and where none is filed, there is nothing for the Court, or any judge thereof, to act upon, even for the granting of a supersedeas. A supersedeas cannot be granted where there is no assignment of errors. The clerk cannot issue a notice till there is such assignment (see rule 20); for the assignment governs him as to parties. It is the *præcipe* as well as complaint. Again, by rule 28, points not made in some brief of counsel, may be treated by the Court as waived.

In this case, no brief has been filed; hence, all points, had they been made, even, by an assignment of errors, might be regarded as waived.

As, however, there is no assignment of errors, the cause is not before the Court, and must be dismissed.

Per Curiam.—The cause is dismissed with costs.

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1857.CONNER *v.* WINTON.CONNER
v.
WINTON.

The reversal of a judgment carries costs in favor of the appellant, back to the point of error upon which the reversal was made; and if it extend back to the issue of fact tried, the costs of the trial are carried by the reversal.

The application of this rule is for the Court below, and this Court cannot judge of the correctness of that application, unless the items taxed to each party are shown in the bill of exceptions.

APPEAL from the *Wabash* Circuit Court.

Monday,
December 21.

PERKINS, J.—Question upon the taxation of costs.

This case was reversed in the Supreme Court, and remanded. In *Doyle v. Kiser* (1), this Court said that, “the reversal carries costs in favor of the party obtaining it, to the point to which the reversal is made.” And that where the reversal extends back to the issue of fact tried, the costs of the trial are carried by the reversal.

Such is the rule. The practical application of it is, in the first instance, for the Court below, and this Court cannot judge of the correctness of that application, unless the items taxed to the parties respectively are shown in the bill of exceptions. In the case now before us, the bill of exceptions states that the Court “adjudged all costs against said plaintiff, which accrued previous to the point of error at which the Supreme Court reversed the case.” The Court below seems to have been acting upon the correct rule. How they applied it to the respective items, in determining which did, and which did not, accrue prior to that point, the record does not enable us to say; and we must presume in favor of the action of that Court.

Per Curiam.—The judgment is affirmed with costs.

J. D. Conner and *H. P. Biddle*, for the appellant.

(1) 8 Ind. B. 396. See *Andrews v. Hammond*, 8 Blackf. 540.

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O'DAILY v. THE STATE.

McINTIRE
v.
THE STATE.

Monday,
December 21.

APPEAL from the *Tippecanoe* Court of Common Pleas.
Per Curiam.—This case is similar to that between the same parties, decided at the present term (1).

For the same reasons there given, a majority of the Court are of opinion that the same judgment should be given.

The judgment is reversed.

E. H. Brackett and *J. O'Brian*, for the appellant.

J. L. Miller, for the state.

(1) 9 Ind. R. 494.

McINTIRE v. THE STATE.

Indictment for receiving stolen property. The state was permitted to introduce testimony tending to show that the person of whom the defendant had received the property, had stolen other property of the same kind, from another person, at a different time. *Held*, that this was error.

Friday,
December 25.

APPEAL from the *Decatur* Circuit Court.

HANNA, J.—The appellant was indicted, tried and convicted in the *Decatur* Circuit Court, for receiving stolen property.

The evidence for the state tended to show that a horse was stolen from one *Mahan*, in *Oldham* county, *Kentucky*, by a person there calling himself *Duran*, who brought the horse to *Decatur* county, where he passed by the name of *Spencer*; that the prisoner received the horse from *Spencer*, and sold him to one *Holmes*. The prisoner's defense was, that he had purchased the horse from *Spencer* in good faith.

It appeared in evidence that soon after *Spencer* brought the horse to *Decatur* county, he left that vicinity; and there-

106	26
147	55
111	26
Case 2	
162	182

upon the state was permitted, against the defendant's objection, to prove by one *Bimer*, that during the week, and about the time *Spencer* left, another horse was stolen from the witness's father, which was recovered by the witness from one *Hopwood*, in *Oldham* county, *Kentucky*.

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1857.

McINTIRE
v.
THE STATE.

This evidence was plainly inadmissible. Suppose it to have been sufficient to raise a presumption that *Spencer* had stolen *Bimer's* horse, it was wholly disconnected with the theft of the horse received by the prisoner. The proof of that larceny did not tend to show that *Spencer* had stolen *Mahan's* horse, much less that *McIntire* had received it knowing it to be stolen. It was a fact not in issue, and one which the prisoner could not have reasonably anticipated, nor was he required to meet it with evidence.

This proof may have prejudiced the defendant. That the horse had been stolen by *Spencer*, was a fact which the state was required to prove. In aid of the prosecution, it was attempted to show that *Spencer* was a thief, by proving another larceny in addition to the one alleged in the indictment, and from that proof to presume a larceny by *Spencer* of the horse in question. This was clearly erroneous; for another material point to be established by the state, was, that the defendant knew, at the time he received the horse, that he was stolen property. On account of the relations which existed, in this instance, between *Spencer* and the defendant, this knowledge may have depended upon whether *Spencer* was the actual thief; and that he was such could not, we think, be presumed from proof of the commission of another and distinct offense by him. See *Engleman v. The State*, 2 Ind. R. 91, and authorities there cited.

A new trial should have been granted.

Per Curiam.—The judgment is reversed. Cause remanded for a new trial.

R. C. Talbott, for the appellant.

J. W. Gordon, for the state.

Nov. Term,
1857.

BLYSTONE v. BURGETT.

BLYSTONE
v.
BURGETT.

If personal property mortgaged in another state be removed into this state while yet in the rightful possession of the mortgagor, and here sold, the mortgagee cannot recover it from the purchaser, on condition broken, without pleading the statute of the state where the mortgage was made, to enable the Court to judge whether the instrument has been recorded in accordance with its provisions.

An admission by an innocent purchaser without notice that the mortgage was made in good faith, is sufficient to explain the badge of fraud implied by the mortgagor's possession; and if the mortgage were otherwise valid in this state, such admission would entitle the mortgagee to recover.

A chattel mortgage was unknown at common law; but if this were not so, the rule that the common law may be presumed to exist in a foreign state, so far as it is not modified by statute, is much shaken, if not overthrown, by late decisions.

Such a mortgage purporting to be executed in another state, cannot be presumed to have been executed in this state; nor can it be in any way affected by our laws until it has undergone some change under them.

This Court will give a chattel mortgage such effect as it is shown to be entitled to in the state where it is executed.

Tuesday,
December 29.

APPEAL from the *Tippecanoe* Court of Common Pleas.

STUART, J.—Complaint by *Blystone* against *Burgett* for the recovery of a yoke of oxen alleged to be unlawfully detained, &c. The defendant denied generally *Blystone's* right to the possession. Trial by the Court, and finding for the defendant.

The trial was had upon an agreed statement of facts. Both parties claimed title to the oxen from one *Yeatty*. It appears that on the 24th of *November*, 1854, *Yeatty* mortgaged to *Blystone* the oxen in controversy. The mortgage was executed in *Cumberland* county, *Illinois*, where both *Yeatty* and *Blystone* resided. The object of the mortgage, (including other property besides that claimed here,) was to secure a note of 375 dollars. There was no reservation of the possession of the mortgaged property in the mortgagor. The mortgage was recorded four days after its execution in the recorder's office of *Cumberland* county, and state of *Illinois*.

It is admitted in the agreed statement of facts that the mortgage was made in good faith between the parties.

The possession of the mortgaged property remaining in the mortgagor, *Yeatly*, he removed the oxen thus mortgaged from the state of *Illinois* to the state of *Indiana*, without the knowledge of *Blystone*, and there sold them to one *Cary*, without disclosing the mortgage, and *Cary* sold to the defendant *Burgett*. It is further agreed that demand was duly made after sale and before suit, and that the value of the oxen was 80 dollars.

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1857.

BLYSTONE
V.
BURGETT.

And the only question is, which title shall prevail, that of the mortgagee in *Illinois*, or that of the purchaser in *Indiana*?

We are referred to the case of *Ingersoll v. Emmerson*, 1 Ind. R. 76, as a case in point in favor of the title of the mortgagee. But we think the distinction between the two cases is well defined. In the case in 1 Ind., *Gideon Halliday*, who sold the boat, was a mere bailee. The boat was mortgaged at *Cleveland, Ohio*, bailed to *G. H.* for a particular purpose, and while thus in his possession *G. H.* sold the boat at *Lafayette, Indiana*. It was held, that if the bailee of goods for a particular purpose, not having the indicia of property other than its possession and control, sell, in contravention of such purpose, to a *bona fide* purchaser without notice, the latter cannot resist the claim of the real owner.

But the case at bar is very different. The mortgagor, having never parted with the possession, nor made any stipulation to do so, drove the oxen beyond the jurisdiction of *Illinois*, and there sold them. In this case, the party assuming to sell was the mortgagor in possession. His possession was not for a special purpose. He was not a bailee. The mortgagee had no right of possession until condition broken; and it is doubtful whether he had then, without a judicial proceeding. *Yeatly* was still the owner in possession, and nothing in the mortgage provided how that possession should be taken from him.

Perhaps it would readily occur to any one, that as to innocent purchasers, or *bona fide* creditors without notice, the mortgage was fraudulent and void. But that is again removed by the admission of *Burgett*, himself an innocent

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purchaser without notice, that the mortgage was executed in good faith. The badge of fraud which the possession of the mortgage implied could have been explained by evidence, showing the mortgage to have been a *bona fide* transaction. This is quite as effectually accomplished by the admission of *Burgett*. Suppose the mortgage to be otherwise valid in this state, *Burgett's* admission removed the only obstacle in the way of *Blystone's* recovery.

But it remains to be considered what effect is to be given to the *Illinois* mortgage. The statute of *Illinois* authorizing the mortgage of chattels, if there be any, is not pleaded. We cannot know judicially that there is such a statute. A chattel mortgage was unknown at common law.

Under some of the earlier decisions, we might indulge the presumption that the common law prevails in *Illinois*. Thus, in *Titus v. Scantling*, 4 Blackf. 89, it is said that the common law, so far as it does not interfere with the statutes of a state, must be presumed to be in force in such state. And the same presumption was indulged fifteen years earlier, in *Stout v. Wood*, 1 Blackf. 71. See, also, *Wright v. Delafield*, 23 Barb. 498. But this presumption of the prevalence of the common law in *Illinois*, destroys *Blystone's* title at once. For where there could be no chattel mortgage, *Blystone* acquired no title.

But this rule, presuming the existence of the common law in a sister state, is very much shaken, if not entirely overthrown, by the later authorities. See *Shaw v. Wood*, 8 Ind. R. 518, and the authorities there cited (1).

It is held by this Court, in *Franklin v. Thurston*, 8 Blackf. 160, that a mortgage sought to be foreclosed in this state must be presumed to have been executed here, until the contrary appears. And this doctrine is followed in *Hutchins v. Hanna*, 8 Ind. R. 533, and *Shaw v. Wood*, *id.* 518. But in neither of the instruments there in suit was the state mentioned on the face of the instrument. But here the mortgage purports to be executed in *Cumberland* county, in the state of *Illinois*, and to be acknowledged and recorded there. This cuts off all presumption as to the

place of its execution. We cannot contradict the face of the instrument by any presumption of its having been executed in this state, for the purpose of having our laws apply. In such case it can only be affected by the laws of *Indiana* after it has undergone some change under them. *Doe v. Collins*, 1 Ind. R. 24.

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BLYSTONE
v.
BURGETT.

We have been referred by counsel outside of the case, who took an interest in the question, to 2 Hilliard on Mort. 412 to 416, 2 Spears, 556, and *Offut v. Flagg*, 10 N. H. R. 46. In Hilliard, there is a general review of the authorities on the question of chattel mortgages. We have not been able to find 2 Spears in the state library. The case of *Offut v. Flagg*, *supra*, is this: *Alanson Coon*, on the 30th of *May*, 1836, mortgaged to *Offut* a certain lot of personal property at *Lowell, Massachusetts*, at which place the parties then resided. The mortgage was given to secure 50 dollars on demand, and was duly recorded on the day of the date, in said *Lowell*, in conformity to the laws of *Massachusetts*. In *June*, 1837, *Coon* moved to *Nashua, New Hampshire*. In *October*, 1837, *Flagg* attached the mortgaged property for a debt contracted at *Nashua*. In *November* following, *Offut* demanded the mortgaged property of *Flagg*, who refused to deliver, &c. The mortgage was never recorded in *New Hampshire*, though *Offut* knew that *Coon* had left *Lowell, Massachusetts*.

On this state of facts, the question was submitted to the Court whether *Offut*, the mortgagee, was entitled to recover the property.

In examining the question, that Court in substance say that, being recorded where the parties at the time resided, the conveyance became legally a mortgage; that there was no provision of the laws of *New Hampshire* inconsistent with its validity; and that the moving of the property from one jurisdiction to another did not contravene any statutory provision. It was further said, that the law of *New Hampshire* was silent on the subject, and was not to be extended in its operation beyond the cases specifically provided for.

But this case is clearly distinguishable from that at bar.

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1857.

HARPER
v.
POUND.

The mortgage was duly recorded on the day of its date, in conformity to the laws of *Massachusetts*. That is the material point in the case. Had the laws of *Illinois* been brought judicially to the notice of the Court in this case, as they appear to have been in that, so that we could have said here as they said there, that the mortgage was recorded agreeably to the laws of *Illinois*, we should have had no difficulty in sustaining the validity of the mortgage (2).

So far as regards personal property, we are inclined to give a mortgage such effect as it is shown to be entitled to in the state where it was executed.

Per Curiam.—The judgment is affirmed with costs.

W. C. Wilson, for the appellant.

G. S. Orth and *J. A. Stein*, for the appellee.

(1) See 15 Maine R. 147.

(2) See *Barker v. Stacy*, 25 Miss. R. 471; *Ryan v. Clanton*, 3 Strobb. 411.

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126	245
10	32
100	140

HARPER v. POUND.

Suit upon a lease, assignment and guaranty. The lessee agreed to make certain improvements on the premises. The lessor assigned the lease or agreement to the appellee, and guaranteed that the lessee would perform his part of the contract within 10 dollars' worth of work. The assignee sued the lessor.

Held, 1. That the lease, assignment and guaranty were a sufficient cause of action.

2. That it was not necessary that the consideration for the guaranty should be set out.

Where no objection was made to the sufficiency of a cause of action in the Court below, the objection cannot be taken in error, if there be enough to bar another action for the same cause.

Evidence going to contradict or explain the face of a written contract containing no terms of art or mystery, or ambiguity, is inadmissible.

A local usage or custom must, at least, appear to be long continued, uniform and generally known, to entitle it to consideration in explanation of a contract.

The recognition of local usages is, as a general rule, contrary to the public

policy of this state: indeed, it seems, that a good usage or custom in this state should, in addition to the common-law requisites, be shown to prevail throughout the state as a single locality.

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1857.

Aliter, with commercial usages.

HARPER
V.
POUND.

In the absence of words of limitation, the term *to clear*, as applied to removing timber from land, means, to remove all the timber of every size, except the stumps; and parol evidence of a local meaning of the word is inadmissible to explain a written contract.

APPEAL from the *Vigo* Circuit Court.

Saturday,
January 2,
1858.

STUART, J.—Suit before a justice of the peace upon a written agreement, and the assignment and guaranty indorsed thereon. Damages claimed, 100 dollars. The agreement, &c., was filed before the justice as a cause of action. It was as follows:

“Article of agreement made and entered into this 27th day of *May*, 1845, between *Warren Harper* and *Jonathan Frakes*, both of the county of *Vigo*, and state of *Indiana*, as follows: The said *Harper* has rented or leased the farm where he now resides for the term of five years from the first day of *March*, 1845, for which the said *Frakes* is to clear out the field east of the house, and put the fence eight rails high, or seven and a ground chunk. He is also to have the use of the wood pasture, but not to cut any timber in it; and he is also to clear and fence nine acres and a half lying north-west from the house, and put a fence eight rails high without a ground chunk, and to have all [the timber] on the nine and one half acres, except what it takes to make and keep up the fence. The said *Frakes* is to take no timber off said land, except where he is to clear, and out of the field first mentioned, and he is to leave the place in good repair. [Signed] *Warren Harper*, *Jonathan Frakes*.”

This contract was assigned to *Joseph Pound*, the appellee, as follows, viz.:

“*March* 28, 1846. I assign the within to *Joseph Pound*, and go *Jonathan Frakes*’ security that he will complete his contract within ten dollars’ worth of work. [Signed] *Warren Harper*.”

These papers are necessary to show the point of the errors assigned.

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1857.

HARPER
v.
POUND.

There was a trial and recovery before the magistrate; and, on appeal to the Circuit Court, a trial without a jury, and finding for *Pound*, the plaintiff below, for 94 dollars. Motion for a new trial overruled, and the evidence made part of the record. *Harper* appeals.

The errors assigned, as far as they conform to the statute, are—

1. That there was no sufficient cause of action to charge *Harper*.

2. There is no consideration shown for the guaranty.

3. There is no diligence shown to collect the claim from *Frakes*.

4. The rejection of evidence offered by the defendant below.

There is no error assigned in relation to the overruling the motion for a new trial; so that the sufficiency of the evidence to support the finding is tacitly admitted. Nor would the assignment of such error have availed; for the evidence was conflicting, and in such cases we never disturb the finding of the Court or the verdict of the jury on questions of fact.

1. The insufficiency of the cause of action. This Court has always given a liberal construction to pleadings before magistrates. *The State v. Mowbray*, 6 Blackf. 89.—*Olds v. The State*, *id.* 91.—*Cook v. Hedges*, *id.* 184. See, also, *Mullen v. The Board of Commissioners, &c.*, at the present term (1). We think the lease, assignment and guaranty a sufficient cause of action.

Besides, no objection was taken to the sufficiency of the cause of action, either before the magistrate or in the Circuit Court. It is too late to take the objection on error, if there be enough to bar another action for the same cause. R. S. 1843, p. 870.

2. The consideration of the assignment, &c., is not set out. It was not necessary. R. S. 1843, p. 589, § 2. *Harris v. Pierce*, 6 Ind. R. 162.

3. No diligence was shown to collect of *Frakes*, and no excuse for the want of it. As a question of law, this error goes to the sufficiency of the complaint before the justice,

and must fall under the same ruling as the first error. As a question of fact, it has been found in favor of the affirmative, and we have nothing to do with it.

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1857.

HARPER
v.
POUND.

4. The rejection of evidence offered by the defendant. This question is presented by two separate bills of exceptions. The first relates to the value of completing the work to be done by *Frakes*. It was proved to be worth one dollar and fifty cents per acre to clear the land of timber, brush and undergrowth. Defendant offered to prove, by a competent witness, that the *clearing* out of the land mentioned in the contract, was of other and distinct matters than the clearing and removing the timber, &c., and that it was not worth more than one dollar in all to clear out the matters and things intended, and agreed, and understood by the parties as to be cleared out, at the time of making the contract.

This evidence was clearly inadmissible. It was in substance a proposition to contradict the face of the contract. It does not appear that the Court were at all in doubt as to the terms and meaning of the contract on its face. Where there was no ambiguity, and no terms of art or mystery, no explanation of the contract could be admitted. The evidence was correctly excluded.

In the second bill of exceptions in relation to evidence, the defendant below offered to prove that, according to the usage of that locality, the term *to clear*, meant, and was understood by the parties to include, the clearing and removing of timber eighteen inches and under, and that such clearing was not worth as much per acre as the plaintiff had proved. This evidence, on the objection of the opposite party, was also excluded. And we think correctly. For to entitle a usage to consideration in exposition of a contract, it should appear to be long continued, uniform and generally known. To permit the temporary or indolent usages of each locality to control contracts, would be to make contracts conceived in the same language, and relating to the same subject-matter, mean one thing in one place and another in another. A contract for clearing land might thus be made to mean one thing in *Posey* county,

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and quite another in *Steuben* or *Lake*. In one locality, the word *clearing* might mean to take out the stumps; in another, to clear off everything but the stumps; and in another, to clear off such timber as was eighteen inches and under. And the same contract, in precisely the same words, would mean each of these things in the respective localities. This would create a body of local laws far more intricate and embarrassing in judicial investigations than the local statutes with which the state was formerly inundated. The recognition of these local usages is, as a general rule, contrary to the public policy of this state. Our constitution and judicial decisions are hostile to local legislation and local customs. The policy of the state is to have all her localities a unit—the same law and the same rule of decision prevailing everywhere throughout the state. Perhaps it is not too much to say that a good usage or custom in this state should, in addition to the common law requisites, be shown to prevail all over the state, regarded as a single locality. See *Cox v. O'Riley*, 4 Ind. R. 368.

This has nothing to do with commercial usages, which are not peculiar to *Indiana* alone. These, we have recognized as binding upon contracting parties. It is presumed that the usage entered into the minds of the parties, and made a part of the contract. Ang. on Car. § 301.—*Grant v. The Lexington Insurance Company*, 5 Ind. R. 23.

We are well aware of the conflict of authorities on the question of usage. Even a local usage opposed to the general law is not without authority. *Snowden v. Warder*, 3 Rawle, 181.—*Jones v. Fales*, 4 Mass. R. 254.—*Wilcox v. Wood*, 9 Wend. 346. And counsel for *Harper* in this very case, cites authority to show that by a particular usage it takes 1,200 to make 1,000! *Smith v. Wilson*, 3 Barn. & Adol. 729. The case was this: The lessee of a rabbit warren agreed that he should leave 10,000 rabbits—the lessor paying £60 per thousand. In an action by the lessee against the lessor for the price of the rabbits left in the warren, it was held that parol proof was admissible to show, that, by the custom of the country where the lease

was made the word *thousand* denoted 100 dozen or 1,200 rabbits. In the argument of that case, numerous other instances are given where the word *thousand* does not, in this or that branch of business, or locality, mean *ten hundred*.

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We do not, however, feel at liberty to unsettle the meaning of words by following such lights. In addition to the policy of this state, above indicated, we think the word *clearing*, as used among us, imports no ambiguity. Parties may, by contract, enlarge the word so as to expressly, or by necessary implication, include stumps and everything. Or they may, by express terms, or like implication, limit it to clearing all eighteen inches and under. But such express contracts do not establish or tend to support customs. In the absence of any words of limitation, we think clearing means, taking off all the timber of every size, but does not include taking out the stumps. This, we think, was the meaning of the word as used in the contract; and that it could not be explained, enlarged, or limited by parol evidence of a local usage to the contrary. To control the express terms of the contract, the usage must be general in this state.

We omitted to notice the case of *Clayton v. Greyson*, 31 Com. Law R. 343, cited by counsel for *Harper*. That case does not sustain the position assumed by *Harper*, nor impair that above indicated. The word *level*, as used in mining, has a peculiar signification among miners. To enable the Court to give proper construction to the contract, parol evidence was admitted of what miners meant by the word, viz., that among miners *level* was used with reference to a geological *stratum*, and might be a line above or below the horizontal depth of the bottom of the mine. This was a word of art applicable to mining everywhere; and hence its meaning in the minds of the parties was a part of the contract. Such parol evidence is matter of every day occurrence in the Courts. But it does not support the position for which it is cited. If, as in that case, it could be shown that the general meaning of the word *clearing* was thus and so, not in *Vigo* county alone, but

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among farmers generally, then it would fall within the rule we have above indicated. *Plowing* is a word without any absolutely fixed meaning as to the depth of furrow; but the Courts could not, in exposition of a contract, admit parol evidence that plowing in *Clay* or *Vigo* county meant a furrow two inches deep. If parties would contract for such a furrow, they must so express it; otherwise, the Courts will be governed by the general usage.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

J. P. Usher, for the appellant (2).

C. W. Barbour and *S. B. Gookins*, for the appellee (3).

(1) 9 Ind. R. 502.

(2) Counsel for the appellant cited the following authorities:

1. Touching the consideration for the guaranty,—*Leonard v. Vredenburg*, 8 Johns. 29; *Larson v. Wyman*, 14 Wend. 246; *Packer v. Willson*, 15 id. 343; *Rogers v. Kneeland*, 13 id. 114; *People v. Shall*, 9 Cow. 778.

2. Touching the admissibility of evidence to explain the meaning of terms, *Hutchinson v. Bowker*, 5 Mees. & Welsby, 535; 1 Greenl. Ev. § 280, and authorities there cited, particularly *Clayton v. Greyson*, 5 Ad. & El. 302, 31 Eng. Com. Law R. 343; *Powell v. Horton*, 29 Eng. Com. Law R. 452.

(3) Mr. *Gookins*, for the appellee, cited the following authorities:

Touching the consideration for the guaranty,—*Wells v. Jackson*, 6 Blackf. 40; *Early v. Foster*, 7 id. 35; *Harris v. Pierce*, 6 Ind. R. 162.



THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY
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161 133

The act of March 1, 1853, relative to compensation for animals killed or injured by railroad machinery (Laws of 1853, p. 113), is in the nature of a police regulation designed to promote the security of persons and property passing upon the road; and hence, though the owner of the animal be not an adjoining proprietor, and be guilty of negligence in permitting it to stray upon land adjoining the road, he may recover, if the company has failed to comply with the requirements of the statute.

But should a person voluntarily place his animal upon the track, it seems he could not recover, but might, perhaps, be regarded as having abandoned his property.

APPEAL from the *Decatur* Court of Common Pleas.

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1857.

PERKINS, J.—Suit against a railroad company to recover for stock killed on the road where it was not, but should have been, fenced. Recovery by the plaintiff below.

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The owner of the animal killed, a steer, was not a proprietor or occupant of land adjoining the road; but the animal strayed upon the track across lands of another person.

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It is contended that the owner was guilty of negligence in permitting the animal thus to stray and trespass; that the company operating the road used due care to prevent the accident, except as to fencing; and that the statute making the company liable, regardless of the question of negligence, should be construed to refer only to negligence on the part of the company, and hence, not render them liable where there was negligence on the part of the owner of the animal killed. This is a plausible, and not wholly unreasonable, view of the statute (1). But the point has been fully considered by the *New York* Court of Appeals, and a different conclusion arrived at. It is by that Court held, that the statute has the character of a police regulation, designed to promote the security of persons and property passing upon the road, and hence, must be enforced where the company fails to comply with its requirements; though it is admitted that if a person should, in such a case, voluntarily place an animal of his upon the track, thus, by his own act, purposely devoting it to destruction, he could not probably recover. He might, perhaps, be regarded, in such case, as having abandoned his property. *Corwin v. The New York, &c., Co.*, 3 Kern. 42.

This Court has heretofore looked at the statute in the same light. *The Madison, &c., Co. v. Whiteneck*, 8 Ind. R. 217 (2).

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

J. S. Scobey and *W. Cumbach*, for the appellants (3).

J. Gavin and *O. B. Hord*, for the appellee.

(1) Laws of 1853, p. 113.

(2) In *Georgia*, the statute of 1847 made railway companies liable for all damages done to live stock or other property; but in the *Macon, &c., Railway*

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v. *Davis*, 13 Ga. R. 68, it was held that the company is not liable when the damage was caused by the design or negligence of the owner. See, also, 14 Barb. (S. C. R.) 364.

In referring to the case of *Corwin v. N. Y. and Erie Railway*, 3 Kernan, 42, Judge REDFIELD observes that the company had employed the land-owner to build the fence, which he had not done, and it was admitted that if he had owned the cattle he could not recover. "It is somewhat remarkable," he adds, "that the rights of the owner of cattle trespassing, should be superior to those of the owner of the land." Redf. on Railw. 365, note.

(3) Counsel for the appellants cited 5 Ind. R. 111; 14 Barb. (S. C. R.) 364.

BIRD v. McELVAINE.

If *A.* place notes in *B.*'s hands for which the latter is to account, and afterwards *A.* draw an order on *B.* payable out of the first proceeds of the notes, and *B.* accepts it, it is no defense to a suit on the acceptance for *B.* to say that the notes were put into his hands *before* the order was drawn.

An order may be accepted by parol.

A continuance to obtain testimony is rightly refused where the fact sought to be proved is unimportant.

An immaterial issue of law left undecided is no cause for reversal.

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1858.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Suit by *McElvaine*, assignee of *Baldwin & Co.*, against *Bird* upon an acceptance. The facts are few, and as follows:

One *James Dill* executed his note for 268 dollars and 50 cents to *E. J. Baldwin & Co.* Afterwards, he drew an order in their favor in the following words:

"*Fort Wayne, Indiana, October 23, 1854. Abraham Bird, Esq.:* You will please pay to *E. J. Baldwin & Co.* two hundred and sixty-eight dollars and fifty cents (\$268 50) out of the first moneys coming into your hands belonging to me, and oblige yours—*James Dill.*"

The instruments were assigned to the plaintiff. The order was presented to and accepted, by parol, by *Bird*, according to its terms.

The proof was, that, prior to the drawing of the order, *Dill* had placed in *Bird's* hands notes on third persons,

for which he was to account—that subsequently to the acceptance of the order, *Bird* received the proceeds of the notes and refused to apply them upon the order.

The acceptance by parol was good. 3 Ind. R. 428.

Bird's defense in this suit is, that he was not bound to apply the proceeds of the notes in payment of the order, because the notes were placed in his hands before the order was drawn.

We do not see that the defense amounts to anything. No previous appropriation of the proceeds had been made, and he accepted the order in anticipation of them.

From what we have said, it will be manifest that a continuance was rightly refused; because the fact sought to be proved, viz., the time at which the notes were left with *Bird*, was unimportant. The questions in the case were simply, acceptance of the order, and reception of money for its payment.

The issue of law raised by a demurrer which, it is contended, was left undecided, was immaterial; the pleading to which it was addressed constituted no defense to the suit; and, hence, no ground for a reversal is presented on this point.

Per Curiam.—The judgment is affirmed, with 8 per cent. damages and costs.

R. L. Walpole, for the appellant.

J. Morrison and *C. A. Ray*, for the appellee.

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1857.

OVERHISER
v.
McCOLLISTER.

OVERHISER, Executor, v. McCOLLISTER.*

Covenant commenced under the old practice. After the code of 1852 came in force, the defendant filed an answer, which though no defense under the old action of covenant, would have been available in chancery. If its allegations had been proved, it would have reduced the plaintiff's damages to a

* The opinion in this case, though returned by Judge HANNA, was in the handwriting of Judge GOOKINS, his predecessor.

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nominal sum, and might have defeated the action. It was rejected. *Held*, that this was error; the defendant was entitled to the benefit of it.

The measure of damages upon a breach of the covenants of seizin and the right to convey is, as a general rule, the purchase-money and interest; but if there has been a technical breach only, and the covenantee has lost nothing, he can recover only nominal damages.

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January 4,
1858.

APPEAL from the *Blackford* Circuit Court.

HANNA, J.—This was an action of covenant commenced in 1851, by *Mc Collister* against *Roderick Craig*, in his lifetime, and prosecuted to judgment against *Overhiser*, his executor, after the death of *Craig*. The action was brought upon the covenants contained in a deed of conveyance, executed in 1849 by *Craig* to *Mc Collister*. The consideration expressed in the deed was 300 dollars. The covenants upon which breaches were assigned were, that *Craig* was “lawfully seized of a good and indefeasible tax-title to the premises,” and that he had “good right to sell and convey according to a deed that he, the said *Roderick Craig*, held, made to him by *Jacob Brugh*, clerk, acting as auditor of *Blackford* county, *Indiana*.” After these, and a covenant against incumbrances suffered by the grantor, the deed proceeds: “And the said *Roderick Craig* forever quit-claims the above described premises, and the quiet and peaceable possession thereof to the said *Joseph McCollister*, his heirs,” &c. There is a joint breach of the covenants of seizin, and right to convey, assigned, in this, that the paramount title was in one *Mc Gill*, at the date of the deed, and at the commencement of the suit.

The defendant filed nine pleas, which do not require particular notice. The progress of the cause was arrested at this point, by a bill in chancery, the object of which was to reform the deed; but the attempt proved unsuccessful. These proceedings delayed the cause about three years. After the determination of the chancery suit, the pleading was resumed. In the meantime, the code of 1852 had come in force, and the defendant filed an answer in several paragraphs, alleging that before the commencement of the suit the plaintiff had sold and delivered possession of a portion of the land described in the deed, to one *Ken-*

nedy, for 700 dollars, being the full value of the land and all improvements, and had executed a bond to said *Kennedy*, conditioned for the conveyance of it to him, by a deed which should be sufficient to convey, assure and confirm to him a title, as good and indefeasible as he had from *Craig*, which bond had been assigned to *Craig*, in *September*, 1851, after the commencement of the suit.

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On the plaintiff's motion, this answer was rejected, and the defendant's subsequent application for leave to file it was refused. These rulings were excepted to.

There was a jury trial—verdict for the plaintiff for 547 dollars—new trial refused, and judgment, to be levied *de bonis testatoris*.

The rejection of the answer, and the refusal to permit it to be filed, are assigned for error. A provision of the code is as follows:

“In actions already commenced, the pleadings to be had to form issues, the manner of procuring testimony, the examination of parties, the trial and rendition of judgment, and all other proceedings, shall conform to the provisions of this act, as far as practicable.” 2 R. S. p. 223, § 799.

Under this provision, if the matters set up in the answer were available as a defense, in whole or in part, the defendant should have had the benefit of it. The facts sought to be pleaded did not constitute a legal defense to the original action of covenant. To have made them available, the defendant would have been compelled to resort to a Court of chancery, and there they would have entitled him to relief against the judgment, which the plaintiff obtained.

The code provides that the defendant may set forth in his answer any legal or *equitable* defense he may have. 2 R. S. p. 39, § 56. It is true that when the suit was commenced, *Craig* had not purchased in the bond of *McCollister*; but independent of that fact, if what the defendant offered to allege and prove was true, that the plaintiff was still in possession, receiving the benefits of his purchase, and selling a portion of the land to *Kennedy* for double what he had paid for the whole of it, those facts constitu-

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TER.

ted an equitable defense, and the code gave him the benefit of it. It existed in equity when the plaintiff brought his action, and reduced his claim to merely nominal damages. The defendant attempted to plead it before the code was in force; but as it was not cognizable at law, a demurrer to the plea setting it up was sustained.

The measure of damages upon a breach of the covenants of seizin and the right to convey, is, as a general rule, the purchase-money and interest. Rawle on Covenants, 84, 85. But if there has been a technical breach only, and the covenantee has lost nothing, he can recover no more than nominal damages. This rule is recognized in *Martin v. Baker*, 5 Blackf. 232, and is obviously just. As the answer which the Court rejected, would, if its allegations had been proved, have reduced the plaintiff's claim for damages to a nominal sum, or might have defeated the action entirely, its exclusion was an error which must reverse the judgment.

It may be objected to this view, that the plaintiff was pursuing a lawful remedy until the code came in force, and that this defense ought not therefore to have been interposed. The case stands thus: The plaintiff was pursuing a legal remedy, in which there was no equity. Had he obtained judgment, a Court of equity would have interposed by injunction, and his recovery would have been rendered fruitless. At this point, a statute takes effect making the equity which would have been the foundation of an injunction, available as a defense. It provides further, that in suits then pending, proceedings to form issues shall be governed by it; and it abolishes the Court of chancery as a separate tribunal. The plaintiff's rights, so far as he had any, might have been saved by requiring the defendant to pay the costs of the action to the time of interposing the defense, and this should have been done.

Per Curiam.—The judgment is reversed. Cause remanded, with instructions to the Circuit Court to permit the defendant to file his answer, on payment of all costs in the action to the time it was offered to be filed; and

with leave to the parties to amend their pleadings. Judgment for the appellant for costs here. Nov. Term,
1857.

J. Brownlee, for the appellant.

W. March and *J. R. Buckles*, for the appellee (1).

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TEES, &C.

(1) Counsel for the appellee cited authorities to the following points:

1. The declaration negatived the seizin and right to convey, which was sufficient. *Martin v. Baker*, 5 Blackf. 232.—Rawle on Cov. for Tit. 84, 85. It might be good on the covenant against incumbrances, also, as it states the title to be in *McGill*. Rawle, *supra*, 147. The covenants of seizin and the right to convey are synonymous. *Id.* 127–130. The latter is broken by an “absence in the vendor of the right to convey.” *Id.* 130. Actual seizin is not sufficient without regard to the right. *Id.* 80. See, especially, *Parker v. Brown*, 15 New Hamp. R. 176; *Lockwood v. Sturdevant*, 6 Conn. R. 374; *Howell v. Richards*, 11 East, 633; Rawle on Cov. for Tit. 50, 52, 60; 4 Kent, 471.

2. It is well settled that a mere notice, or even a parol agreement cannot control the covenants in a deed, in such an action as this. Rawle on Cov. for Tit. 150 to 155.—*Townsend v. Weld*, 8 Mass. R. 146.—*Harlow v. Thomas*, 15 Pick. 70.—*Keith v. Day*, 15 Vt. R. 660.—*Hubbard v. Norton*, 10 Conn. R. 431.—*Batchelder v. Sturgis*, 3 Cush. 203.—10 Wend. 184.—11 Ill. R. 194.—1 Ala. R. 646. Nor can mere words of reference to the source of the title control or modify the covenants. Rawle, *supra*, 527, and authorities there cited.—*Hubbard v. Apthorp*, 3 Cush. 419.—*Mills v. Catlin*, 22 Vt. R. 98.—*Cooke v. Founds*, 1 Levinz, 40. This last case is much like that at bar.

HENBY v. THE TRUSTEES OF RIPLEY TOWNSHIP.

Landholders cannot erect gates upon the township highways, as contemplated by § 35, 1 R. S. p. 314, unless the township trustees authorize it by providing the proper regulations.

APPEAL from the *Rush* Circuit Court.

Monday,
January 4,
1858.

HANNA, J.—Application having been made by petition to the board of trustees of *Ripley* township, in the county of *Rush*, for opening a township road passing through the lands of *Henby*, the appellant, he remonstrated. His remonstrance was overruled, when he prayed to have his damages assessed, which was done, and the road was ordered to be opened. He then applied for leave to erect

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swinging gates across said road on his own land, which application the trustees refused. He appealed to the board of commissioners of *Rush* county, where the decision of the township trustees was affirmed; and on appeal to the Circuit Court, a like result ensued. He brings the case to this Court upon a single question, to be resolved upon a proper construction of § 35, 1 R. S. p. 314, which reads as follows:

“Any person may have swinging gates put on such township highways on his own land under such regulations as such trustees shall prescribe, but in such case he shall keep the same in a condition to be opened by persons on horseback; and any person leaving any such gate open, for every such offense shall be liable to a fine of one dollar, to be recovered before a justice of the peace.”

There can be but little doubt about the construction that ought to be given to this section, when we look carefully to its language. Such gates are put up “under such regulations as such trustees shall prescribe.” Without the trustees thus act—thus prescribe regulations—a landholder has no authority to construct and maintain such gates. He cannot act of his own volition, and without their authority. And if not, why ask their authority, if they are compelled by law to make the grant? This Court decided, in the case of *The State v. Dunning*, 9 Ind. R. 20, that the governor had no power to remit a forfeiture until the legislature had “prescribed the regulations,” &c. The reasoning upon that point in that case is conclusive in this case.

Per Curiam.—The judgment is affirmed with costs.

G. C. Clark, for the appellant.

A. W. Hubbard and *L. Sexton*, for the appellees.

STOOPS v. THE GREENSBURGH AND BROOKVILLE PLANK-
ROAD COMPANY.*

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1857.

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v.	155	65
THE GREENS- BURGH, &C. PLANKROAD COMPANY.		

If the answer allege payment, and there be no reply, the defendant is entitled to judgment on the pleadings.

The first section of the charter of the *Greensburgh and Brookville Plankroad Company* declares the directors named, a corporation *ab initio*. The requirement touching the organization of the company was merely directory. Hence, a subscription to the capital stock before such organization, was valid.

And the subscriber was estopped to deny the existence of the corporation, in the absence of fraud.

A corporation having become, by virtue of its charter, a legal entity, the failure to perform any act prescribed in the charter would not terminate its existence. That can be done only by a direct proceeding.

APPEAL from the *Franklin* Circuit Court.

Tuesday,
January 5,
1858.

HANNA, J.—Action by the appellees as an incorporated company, against the appellant, to recover a subscription to their capital stock. Answer in eight paragraphs. Demurrer to the second, third, seventh and eighth paragraphs, for the reason that said paragraphs do not, nor does either of them, state facts sufficient to constitute a good defense to the action. Demurrer sustained to the second, seventh and eighth, and overruled as to the third.

The appellant insists that the demurrer was not in proper form, and that it should have been overruled as to all. No exception having been taken to the ruling of the Court, we cannot consider whether the demurrer was well taken or not.

The fourth paragraph of the answer alleged payment of the subscription in full. To this there was no reply. There was a jury trial upon other issues; verdict and judgment for the plaintiff.

The allegation of payment stood admitted. 2 R. S. p. 44, § 74.—*Bird v. Lanus*, 7 Ind. R. 615. The defendant was, therefore, entitled to judgment on the pleadings. 2 R. S. p. 121, § 372. For this error, the judgment must be reversed.

*The opinion in this case was in the handwriting of Judge Gookins.

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THE GREENSBURGH, & C.
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COMPANY.

As the cause will be remanded for further proceedings, we will consider a question raised by the appellant, going to the merits of the case. It arose in the Circuit Court upon instructions given and refused. The instructions prayed by the defendant, and refused by the Court, assumed that his subscription to the stock of the company was made before the directors named in the act of incorporation had organized by meeting and electing a president and secretary. That given by the Court, admitting the fact as assumed, informed the jury that if the directors met and organized by electing said officers within a reasonable time after the defendant subscribed, the contract was valid.

This company was incorporated by an act approved *January* 15, 1849, (Local Laws 1849, p. 87,) the first section of which constitutes *Hiram Carmichael* and five other persons a body corporate and politic, by the name, &c., with the usual corporate powers to sue and be sued, &c. The second section styles those named in the first, directors, and requires them to open books for the subscription of stock at such time as they may think best. The fourth section adopts, as a part of the company's charter, several sections of an act passed in 1847, to incorporate the *Greensburgh and Napoleon Turnpike Company*. Local Laws of 1847, p. 125. Among the sections adopted is the third, which requires the directors to meet and organize by electing one of their number president, another clerk and treasurer.

The appellant's position is that until the directors had met and elected officers, the corporation had no legal existence, and no valid subscription could be made for the want of mutuality, and because there was no promisee.

To this position there are several answers—

1. The first section of the charter declares the directors named, a corporation *ab initio*. The requirement concerning the organization of the company was merely directory. *Judah v. The American Live Stock Ins. Co.*, 4 Ind. R. 333.

2. The defendant, by his contract, was estopped to deny the existence of the corporation, in the absence of fraud. *John v. The Farmers and Mechanics' Bank*, 2 Blackf. 367.

—*Ryan v. Vanlandingham*, 7 Ind. R. 416; and authorities cited in *Judah v. American Live Stock Ins. Co.*, *supra*. Nov. Term,
1857.

3. The corporation having become, by virtue of its charter, a legal entity, the failure to perform any act prescribed in the charter would not terminate its existence. That end can be attained only by a direct proceeding. *The Newcastle Turnpike Co. v. Bell*, 8 Blackf. 584.—*The Covington, &c., Plankroad Co. v. Moore*, 3 Ind. R. 510.—*The Western Plankroad Co. v. Stockton*, 7 *id.* 500. JEFFERSON-
VILLE RAIL-
ROAD CO.
v.
APPELLEGE.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with instructions to permit the parties to amend their pleadings.

J. Ryman, D. D. Jones and H. Berry, for the appellant.

J. D. Howland and G. Holland, for the appellees.

JEFFERSONVILLE RAILROAD COMPANY v. APPELLEGE.

This case is precisely like *The Indianapolis and Cincinnati Railroad Company v. Townsend*, *ante*, 38.

APPEAL from the *Clark* Circuit Court.

Tuesday,
January 5.

HANNA, J.—This was an action by *Applegate* against the railroad company, for injuries to a mare, the property of said *Applegate*, by running against and striking her with the cars, &c., of said company. The evidence shows there was no negligence in the company other than that of not having their road fenced. It also shows that the mare was feeding about twenty yards from the track of the road, and as the locomotive and train approached, she started and ran upon the track about thirty feet before the locomotive. She then received the injury. The plaintiff was not the owner of the land abutting upon the road at that point. The mare was in the habit of running at large in that vicinity, and was turned out by the plaintiff for the purpose of her getting water and food. The road of defend-

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v.
THE STATE.

ants was not fenced. No evidence was offered that the board of county commissioners had passed any order allowing such animals to run at large. *Applegate* had judgment for the amount of damage proved, to-wit, 50 dollars.

The defendant insists that the mare of plaintiff was by him wrongfully suffered to run at large, and on defendants' road, and therefore he had no right to maintain this suit.

This is the point in the case; and we have already passed upon it at this term, in the case of the *Indianapolis and Cincinnati Railroad Company v. Townsend* (1).

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

R. Crawford, for the appellants (2).

J. D. Ferguson, for the appellee.

(1) *Ante*, 38.

(2) Mr. *Crawford* cited the following cases:

The mare was wrongfully on the defendants' road, and the plaintiff was a wrongdoer by turning her there. *The Lafayette, &c., Railroad Co. v. Shriner*, 6 Ind. R. 145.—*Railroad v. Skinner*, 19 Penn. R. 298.—*Talmadge v. Ren. and Sar. Railr. Co.* 13 Barb. 390.—*Brook v. N. Y. and Erie Railr. Co.* 19 *id.* 364.—*Vandegrift v. Rediker*, 2 Zab. 185.—*Aurora Branch Railroad v. Grimes*, 13 Ill. R. 585. If it appeared from the evidence that no negligence on the part of the defendants caused the injury, or that the negligence of the plaintiff caused it, or contributed to produce it, he should not have recovered. *Hawkins v. Cooper*, 34 E. C. L. 285.—*Sill v. Brown*, 38 *id.* 245.—*Brand v. Troy and Schen. Railr. Co.* 8 Barb. 368.

Mr. *Crawford* contended that the case was not governed by the statute of March 1, 1853.

McCole and Another v. THE STATE on the relation of CHIPMAN.

An action upon a recognizance for appearance in the Circuit Court may be brought in the Common Pleas, if the amount is within the jurisdiction.

Where a justice of the peace has committed a defendant charged with a bailable offense, for failure to enter into recognizance, the sheriff may, before an indictment is found, and without an order of the Court, judge or clerk fixing the amount of bail required, accept bail in the amount specified in the warrant of commitment.

This Court will not examine a question upon the sufficiency of evidence, where the bill of exceptions purports to contain only "the substance of all the evidence introduced."

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1857.

McCole

v.
THE STATE.

Tuesday,
January 5.

APPEAL from the *Hamilton* Court of Common Pleas.

HANNA, J.—This was an action on a recognizance taken by the sheriff—one *Jesse H. Willis* being in his custody by virtue of what is called in the record a commitment from a justice of the peace, for failing to find security in the sum of 500 dollars, for his appearance in the Circuit Court to answer to a charge of larceny. There was judgment for 500 dollars, the amount of the recognizance.

By a demurrer to the complaint, the question is presented, whether this suit can be maintained in the Common Pleas Court. It is contended by the appellants that the exclusive jurisdiction is in the Circuit Court, in actions upon a recognizance for appearance in that Court; and we are referred to § 48, p. 366, 2 R. S. 1852. That section reads as follows:

"The prosecuting attorney may, at any time after the adjournment of the Court, proceed by action against the bail upon the recognizance. Such action shall be governed by the rules of civil pleading so far as applicable."

In the act providing for the organization of Circuit Courts, we do not find any provision giving exclusive jurisdiction to that Court, in suits of this character. Section 11 of the act establishing Courts of Common Pleas, gives to that Court, in civil cases, "concurrent jurisdiction with the Circuit Court, when the sum due or demanded, or the damages claimed, shall not exceed one thousand dollars." It is insisted that this gives jurisdiction to that Court. We do not perceive the distinction, if any exists, between this and any other action for the recovery of a sum of money, so far as the question of jurisdiction of the Court is concerned.

The next point is, that, at the time the sheriff took the recognizance, there being no indictment found, no order of a judge, or of the clerk of the Court, fixing the amount of bail required, the sheriff had no power or authority to take and approve such recognizance. This question is, in effect,

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v.
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presented by the various pleadings in the form of answers, replies and demurrers. The appellants say that "to give the sheriff authority to take bail, there must be an indictment found, and an order of a Court, judge, or clerk, specifying the amount of bail required;" and they refer us to the statute upon the subject of arrest and recognizance. 2 R. S. p. 364. Section 41 of that act is as follows:

"When any person is committed for want of bail, and the amount of bail is specified in the warrant of commitment, the sheriff may take the recognizance and approve the bail."

The ninth section of the act prescribing the powers and duties of justices in state prosecutions, gives a justice the power to require of a defendant a recognizance in a sum to be fixed by such justice, for appearance in the Circuit Court, to answer to a charge of a felony. The thirtieth section gives the justice the power to "commit such defendant to the county jail, until discharged by due course of law," upon failure to enter into recognizance as required. One of the modes of being discharged by due course of law, we think, is to give bail, to be approved by the sheriff, in such sum as may be specified in the warrant of commitment. We believe the letter of the statute gives the sheriff this power; and if it did not, the whole spirit of our laws favors the right of the citizen to liberty. If charged with a bailable offense, he has that right, at the earliest moment he can furnish reasonable bail; and we know of no legal mode of availing himself of that right at an earlier moment than to have the privilege of giving bail to the acceptance of the officer who may have him in custody, without waiting until an indictment may be found, or the order of a superior judge procured.

The last point made is, that the evidence is insufficient to warrant the judgment. There is nothing before us upon which we can determine that question. It is true, there is a long bill of exceptions which professes to contain "the substance of all the evidence introduced upon the trial of said case." The 30th rule of this Court requires that in a bill of exceptions purporting to set out the evidence, the

words "this was all the evidence given in the cause," are to be regarded as technical, and indispensable to repel the presumption of other evidence. The decisions of this Court are in conformity with that rule, in cases tried since its adoption (1).

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TYLER
v.
WILKINSON.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

W. Garver, for the appellants.

D. C. Chipman, for the state.

(1) See *Jarvis v. Strong*, 8 Ind. R. 284; *Cully v. Imell*, id. 456; *The New Albany, &c. Co. v. Callow*, id. 473, on petition for a rehearing; *Nutter v. The State*, 9 id. 178; *The Jeffersonville Railroad Co. v. Butler*, id. 205; *The State v. Swarts*, id. 221; *Manly v. Hubbard*, id. 230.

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APPEAL from the *Jennings* Circuit Court.

Tuesday,
January 5.

Per Curiam.—Separate demurrers to complaint by defendants below. Demurrer of *Wilkinson* sustained. Judgment on said demurrer for said defendant.

No exception was taken to the ruling of the Court. There is no question before this Court, as we have several times decided (1).

The judgment is affirmed with costs.

J. W. Robinson and *J. W. Gordon*, for the appellants.

H. C. Newcomb and *J. S. Harvey*, for the appellees.

(1) See *Jolly v. The Terre Haute Drawbridge Co.*, and cases cited, 9 Ind. R. 417.

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1857.

HENDERSON v. BURCH.

VANDIBUR

v.
LOVE.

Tuesday,
January 5.

ERROR to the *Greene* Circuit Court.

Per Curiam.—This case has been on file since *December* 10, 1849. The record is not accompanied by any brief. For that reason, if any errors exist, they are presumed to be waived, under the 28th rule of this Court.

The judgment is affirmed with costs.

J. S. Watts, for the plaintiff.

I. Blackford, for the defendant.

VANDIBUR v. LOVE.

Suit by the vendee of an execution-defendant against a constable, for the recovery of personal property. On service of summons in the original suit, the defendant told the constable to tell the plaintiff, or the justice, to set off his property, and if he had more than 300 dollars' worth, the plaintiff might recover his debt. After execution had issued, defendant sold the property. He was a resident householder, and his property, including that sold, was worth less than 300 dollars. After the sale, execution was levied upon the property in the hands of the vendee. Defendant then claimed it as exempt from execution under the statute of 1852. The execution was issued four months before it was levied.

Held, 1. That whilst the execution was in the hands of the officer, and the property in the hands of the execution-defendant, the writ was a lien upon his personal property in the county, and as owner he might claim it as exempt; nor did his sale of the property divest the lien.

2. That the execution-plaintiff and the officer had notice of the intention of the execution-defendant to claim the benefit of the exemption law; that the failure to levy the execution for four months after it issued, was to some extent an acquiescence in the justness of the claim, which, coupled with the fact that the defendant did not possess 300 dollars' worth of property, gave him the right to perfect his claim after levy, for the benefit of his vendee.

Monday,
January 11.

APPEAL from the *Decatur* Court of Common Pleas.

HANNA, J.—This was an action by the appellee against the appellant for the recovery of the possession of personal property.

The case was submitted to the Court upon an agreed statement of facts, in substance as follows: On the 31st of *March*, 1855, *Byrd W. Burk* obtained a judgment against one *Jesse Myers* before a justice of *Decatur* county. On the 12th of *April*, 1855, execution issued. *Myers* then owned the property in dispute, which was worth 70 dollars. On the 10th of *July*, 1855, he sold said property to another person, who, on the 13th of the same month, sold the property to *Love*. *Vandibur*, as constable, levied said execution on said property on the 14th of *August*, 1855. *Myers*, during all that time, was a resident householder of said county, and his property of less value than 300 dollars, including this property, and he had not, prior to its sale by him, claimed such property as exempt from sale on execution, except, "that he told the constable who served the summons in the original suit, at the time of such service, to tell *Burk*, or the justice, to set off his property, and if he had more than 300 dollars, he could get his debt." He claimed it as exempt after the levy, and before this suit was brought.

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v.
LOVE.

There is no controversy about the property having been subject to the execution, and properly levied upon, if it was not exempt under the act to exempt property from sale, &c. 2 R. S. p. 336. Whilst the execution was in the hands of the officer, and the property in the hands of *Myers*, as owner, such writ was a lien upon his personal property in the county, and he had the right to claim it as exempt. His sale of such property did not divest the lien. Did it divest him of his right to claim it as exempt from levy and sale? But, first, did he make the proper claim, if any was necessary, before he sold? These are the only questions in the case.

The statute in force is as follows: "That an amount of property not exceeding in value 300 dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process of a Court," &c. 2 R. S. p. 336, § 1. Sections 5, 6, 7, and 8 of the same act provide for the appraisement of the property to be exempted,

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v.
LOVE.

and for the return of a schedule thereof with such execution, by the officer. The 9th section is as follows:

“If any execution-debtor shall claim property as exempted by virtue of this act, he shall elect whether he will claim personal, or real property, or both, and shall designate the property so claimed.”

The remaining sections of the act prescribe the duties of the officer in appraising, setting apart and selling property. It is insisted by the appellant, that property is not exempt until a claim to that effect is made by the proper person; and that such claim cannot be made until after levy. On the other hand, it is contended that the exemption is for the benefit of the family, and where there is less than 300 dollars worth of property, such exemption is not dependent upon the formality of a claim. We are referred to *Mandlove v. Burton*, 1 Ind. R. 39. That was an action by an execution-defendant against an execution-plaintiff and the officer who had the writ, for property levied on. The property had been fraudulently transferred after the rendition of judgment, and before the execution issued, and the defendant disclaimed title at the time of levy. After levy, he claimed it as exempt under the act exempting 125 dollars' worth of property. The real question presented in the case was as to whether, under the circumstances, the execution-defendant could sue; but the following language is used by the Court: “The circumstance that 125 dollars' worth of this property, had it not been conveyed away, might have been retained by the grantor as exempt from execution, cannot, we think, alter the case. The possessor of such exempted property may, we suppose, sell it. If he do so, and it be subsequently levied on for his debt, the purchaser may probably reclaim it from under the execution, but we do not see where the seller could find title on which to rest a suit.” It is argued that the authority above quoted establishes, first, the absolute exemption of the property without its having been specifically designated or set off, and, secondly, that the property in the hands of the purchaser was exempt in the same manner it would

have been in the hands of the execution-defendant. Whatever may be the effect of the language used, it is evident that it is only incidental to the main question referred to in the last sentence—the right of the seller to maintain an action. The statute then in force somewhat differs from our present exemption law. It is as follows: “That any householder of the state of *Indiana* may save, reserve, select or exempt from execution, personal property to the amount of 125 dollars.” It is urged that that act did not as specially as the present statute, require the person in whose behalf the exemption was claimed, to be the *owner* of the property; and, therefore, if a purchaser of such property, under the former statute, could make the claim, that it cannot be done under this act.

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v.
LOVE.

We think that the facts and circumstances admitted to have existed in this case, show that the execution-plaintiff and the officer had notice of the intention of the execution-defendant to claim the benefit of the exemption law. The failure to act upon the execution from the 12th of *April* until the 14th of *August* was, to a certain extent, an acquiescence in the justness of such claim, and, together with the admitted fact that he did not during such time possess 300 dollars worth of property, gave such defendant the right, when the property was so levied upon, to perfect his claim for the benefit of his vendee.

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

J. Gavin and *J. R. Coverdill*, for the appellant (1).

B. W. Wilson and *O. B. Hord*, for the appellee (2).

(1) Counsel for the appellant cited the following authorities:

The execution-defendant had a right to sell the property, and his vendee took it subject to the lien of the execution. *Payne v. Drewe*, 4 East, 523.—*McCall v. Trevor*, and note, 4 Blackf. 496.

If a judgment-debtor transfer his property with intent to defraud his creditors, and when the officer comes to levy, disclaims ownership, he cannot afterwards claim his exemption: because the sale is a valid one between the vendor and the vendee, and the former has no interest in the property. *Mandlove v. Burton*, 1 Ind. R. 39.

(2) Counsel for the appellee cited two cases taken from a digest, which they did not rely upon, not having the books to verify them. They are as follows:

Where a sale is made by virtue of legal process, it is a forced sale. The

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homestead therefore, which the constitution exempts from "forced sale," can not be sold by legal process, not even if husband and wife have consented, in a deed of mortgage, that the same may be sold on the non-payment of the money due. It is an immunity conferred by the constitution, and can not be renounced. *Sampson v. Williamson*, 6 Texas R. 102.

The head of the family, if a married man, with the assent of his wife, may, in the form prescribed, make an absolute sale of the homestead. *Id.* 13 U. S. Dig. p. 319, §§ 65, 66.

Where the defendant in the execution has but one farm-horse, mule, or yoke of oxen, it is not necessary that he should select, or set apart such horse, mule, or yoke of oxen. When he has several he has the right of selection. *The State v. Hasgard*, 1 Humph. 390.

The defendant may waive the benefit of the act; the fact however will not be presumed, but must be proved by the officer indicted for violating the act. *Id.* 4 U. S. Dig. p. 753, §§ 390, 391.

COLLIER and Others v. THE STATE, on the relation of
LEWIS.

Action against a sheriff and his sureties, on his official bond. Breach, failure to deliver an execution to his successor, or to return it, &c. The action accrued under the statute of 1849, but was brought under that of 1852. *Held*, that the amount of the recovery was governed by the statute of 1852; and that the defendants might give evidence of the insolvency of the execution-defendant, for the purpose of showing the amount that the sheriff might probably have collected.

Monday,
January 11.

APPEAL from the *Putnam* Circuit Court.

HANNA, J.—This action was commenced on the 7th of *June*, 1853, against *Collier* and his securities, on his official bond as sheriff of *Putnam* county.

The breach assigned is, that *Lewis*, the relator, having recovered a judgment against one *Dicken*, sued out an execution thereon, dated *December* 12, 1851, and delivered it to *Collier*, who continued to be such sheriff until *October*, 1852; that he failed to deliver the execution to his successor in office, or to return it to the clerk's office from whence it issued, at the expiration of one year from its date.

A demurrer to the complaint was overruled, and that ruling is assigned for error; but as no exception was taken to the ruling of the Court on the demurrer, there is nothing before us on that point. The same point was raised by the defendants in another form. It arose upon the offer to prove that the execution-defendant was notoriously insolvent; and upon the proof that search for property had been made, and none found.

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v.
THE STATE.

This suit was not brought until after the statute of 1852 was in force, which differs from that of 1849, under which the liability to the suit was incurred. That of 1852 is as follows: "If any sheriff shall neglect or refuse to return any execution, as required by law, or shall make a false return thereon, he shall be amerced in such amount as he might and should have levied by virtue of the execution." This act, we think, controls the manner of the prosecution, and the amount to be recovered. Such portions of the law of 1849 as were inconsistent with that of 1852 are repealed by § 802 of the latter act. 2 R. S. p. 224. Section 803 is as follows: "All rights of action secured by existing laws, may be prosecuted in the manner provided in this act."

We think that although the plaintiff's right of action accrued under the act of 1849, the amount of his recovery is governed by that of 1852; and the defendants should have been permitted to give evidence of the insolvency of the execution-defendant, for the purpose of showing the amount that the sheriff might probably have collected on the execution.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Matson, for the appellants.

C. C. Nave, for the state.

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TURNER v. THE STATE.

PIATT
v.
DAWES.

Wednesday,
January 13.

APPEAL from the *Spencer* Court of Common Pleas.

Per Curiam.—This is a prosecution for selling intoxicating liquors under the statute of 1855. Motion to quash information overruled. Defendant fined.

For the reasons given in the case of *O'Daily v. The State*, at this term, the judgment is reversed (1).

W. C. Moreau, for the appellant.

D. C. Chipman, for the state.

(1) 9 Ind. R. 494.

PIATT v. DAWES.

Suit by a guardian of minor heirs against a lessee of the administrator for the use and occupation of a certain shop. The defendant set up his lease, the validity of which the plaintiff denied. The defendant introduced as evidence an order of Court authorizing a sale of the rents and profits for the payment of debts, and a second order, confirming the administrator's report of the leasing of the property. He then offered the lease in evidence, but it was excluded. It was contended that if the orders were all the proceedings authorizing the lease, it was inadmissible; and if they were not, all the proceedings should have been introduced. *Held*, that a party may prove the facts in his case in the order which he may prefer; that it cannot be presumed that if the lease had been introduced, the defendant would have rested his case upon it and the orders; but that, on the contrary, it must be presumed that the proper proceedings had preceded the order of confirmation. The statute of 1843 authorized administrators to lease real property for the payment of debts, where adversary proceedings were had, at least to the extent of making those interested in the land parties, and giving them notice. Where such proceedings were not had the leasing is of no validity.

Wednesday,
January 13.

APPEAL from the *Marshall* Court of Common Pleas.

HANNA, J.—The facts, as shown by the record, are as follows: *Elizabeth Dawes*, as gurdian of her minor children, heirs of *Frank Dawes*, deceased, brought suit for use and occupation of a certain shop, against *Piatt*, and alleges that deceased was the owner and died possessed of the

premises described; that said heirs were in possession thereof until *Piatt* entered as tenant, &c. *Piatt* admitted the occupation, but denied the right of said *Elizabeth* to recover the rents, and set up that he held under a lease from one *Pomeroy*, who was the administrator of the estate of said deceased, and who executed the same under the authority and by order of the proper Court. To this it was replied, that there was no valid lease; that the execution of a lease had not been authorized; and denials. Upon the trial, the plaintiff proved that deceased died in possession of the shop; that his heirs had possession thereof until defendant entered; and proved the reasonable value of the rents. The defendant thereupon introduced as evidence certain orders, made by the Court, in the estate of said decedent, as follows:

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Of *August* term, 1852. "Now comes the administrator and *C. H. Reeve*, on behalf of himself and other creditors, and it appearing that there are debts that are not paid or any part thereof, and some debts that have been paid in full, and that there are no personal assets to pay with, on motion it is ordered by the Court, on due inquiry made, that said administrator proceed to advertise and offer for sale, for one-third cash down, and the balance in three and six months, the rents and profits of the wagon-shop on lot 45 in *Plymouth*, and the blacksmith-shop over the river in *Plymouth*," &c.

And also the following: "Now comes *William G. Pomeroy*, the administrator, and files a report of the leasing of a certain shop belonging to said estate, in these words (here insert), and moves for confirmation, and after full inspection had, said report is by the Court approved and confirmed."

The bill of exceptions then states that the defendant offered to introduce the lease referred to in the above order, to the introduction of which objection was made and the objection sustained. This raises the question to be considered.

It is insisted by the appellant that the orders of the Court above quoted, are not void, and can not therefore be

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attacked collaterally. This is controverted; and it is also said that the lease ought not to have been given in evidence, if those orders were all the proceedings authorizing the making thereof, and if they were not all the records, that all of the records pertaining to the matter should have been introduced. We have heretofore decided that a party has a right to prove the several facts in his case in the order which he may prefer. *Hadden v. Johnson*, 7 Ind. R. 394.—4 Blackf. 174. We cannot presume that if the lease had been admitted in evidence, the defendant would have stopped there, and rested his case upon the records already produced; but we must presume, so far as any presumption arises upon the point, that the proper proceedings had preceded the order confirming the report of leasing: and therefore it was error to refuse the evidence offered.

As the question will again arise upon the trial below, we might add that the statute of 1843, which authorized an administrator to lease real property for the payment of debts, gave such power in instances where adversary proceedings were had, at least to the extent of making those interested in such lands parties, giving them notice, &c. If no such proceedings were had in this case, the leasing was of no validity.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. C. Newcomb and *J. S. Harvey*, for the appellant.

J. W. Chapman and *J. B. Merriwether*, for the appellee.

BIDDLE v. WILLARD, Governor.

There are two terms known to the constitution and statutes of this state; for which the office of judge of the Supreme Court may be held: 1. A term by election, of six years. 2. A term by appointment, for the time intervening between the appointment and the qualification of the person elected at the general election next succeeding the appointment.

Such judges must be elected, 1. Where there is an existing vacancy. 2.

Where an appointee is occupying the office. 3. Where the term for which an incumbent was elected will expire before another election.

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To constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment.

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A prospective resignation may be withdrawn at any time before it is accepted; and after it is accepted, it may be withdrawn by the consent of the authority accepting, where no new rights have intervened.

Such a resignation creates no necessity for an election.

The duty of the Governor, upon receiving a resignation creating a vacancy in a judicial office, is to appoint a successor; this is the only notice he is required to give of the existence of the vacancy.

And should the Governor communicate a knowledge of such resignation to the public, the communication would not be such legal notice of the fact, as to make it the duty of the clerks of the several counties to give notice of an election.

APPEAL from the *Marion* Circuit Court.

Friday,
January 15.

PERKINS, J.—Application for a mandamus. The complaint is by *Horace P. Biddle*; and it states, that at the *October* election in 1852, *William Z. Stuart* was elected a judge of the Supreme Court, for the first district, in the state of *Indiana*, for the term of six years from the 3d day of *January*, 1853, and was commissioned; that he duly qualified and entered upon the duties of his office; that on the 4th day of *August*, 1857, he communicated to the Governor of the state his resignation of said office, in the following terms:

“*Hon. A. P. Willard, Governor*:

“DEAR SIR:—I hereby resign the office of judge of the Supreme Court, to take effect on the first *Monday* of *January* next, (1858).

“Congenial as are the duties of the office—more so than any other in the gift of the people—my private affairs constrain me to resume the practice. The resignation takes effect at a future day, that there may be no inconvenience to the public service, and ample time for the selection of a successor.

“Permit me to embrace the occasion to tender to the people of *Indiana* my heartfelt acknowledgments for the honor I have received at their hands. Very respectfully
your ob’t servant, W. Z. STUART.

“*Logansport, August 4, 1857.*”

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The complaint further states, that at the general election in *October, 1857*, *Horace P. Biddle* was elected a judge of the Supreme Court, as the successor of Judge *Stuart*, having received about 25,000 votes, and more than 20,000 of a majority; that he had demanded a commission, &c., and that it had been refused.

In the Circuit Court, a demurrer to the complaint was sustained, and a mandamus refused. Appeal to this Court.

Somewhat of a wide range was taken in the argument of this case, but its merits seem to us to lie in a narrow compass.

There are two terms known to the constitution and statutes of the state, for which the office of judge of the Supreme Court may be held, viz.:

1. A term by election, of six years.
2. A term by appointment, for the time intervening between the appointment and the qualification of the person elected at the general election next succeeding the appointment.

We quote the constitution and statute establishing this proposition. Sections 1 and 16, art. 7, of the constitution read:

“The Supreme Court shall consist of not less than three, nor more than five judges; a majority of whom shall form a quorum. They shall hold their offices for six years, if they so long behave well.”

“No person elected to any judicial office, shall, during the term for which he shall have been elected, be eligible to any office of trust or profit, under the state, other than a judicial office.”

Article 5, § 18, runs thus:

“When during the recess of the general assembly, a vacancy shall happen in any office, the appointment to which is vested in the general assembly; or when, at any time, a vacancy shall have occurred in any other state office or in the office of judge of any Court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.”

So far, the constitution. Turning to the statutes, we find section 1 of the general election law providing that, "A general election shall be held annually on the second *Tuesday* in *October*, at which all existing vacancies in office, and all offices, the terms of which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law."

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WILLARD.

And section 2 requires that—

"The clerk of the Circuit Court shall, at least twenty days before such election, certify to the sheriff, &c., what officers are to be elected, and that such sheriff shall give * * * notice," &c. (1).

The provisions of the constitution and statutes we have quoted, it will be seen, not only establish the proposition we have above asserted, but they do more; they specify the cases in which judges shall be elected at the general *October* election.

The following are beyond doubt such cases:

1. Where there is an existing vacancy.
2. Where an appointee is occupying the office. And,
3. Where the term for which an incumbent was elected will expire before another election. Neither of these cases was presented at the last *October* election.

There was no existing vacancy. The election was in *October*. The vacancy did not occur by Judge *Stuart's* resignation till *January* following. The term of no appointee was about to expire. The term for which a judge had been elected was not about to expire.

The question, then, alone remains, was there any other case in which, under the constitution and statutes, an election was to be held for a judge of the Supreme Court, at the last *October* election? and if so, what was it? For it can scarcely be necessary to remark that an election to fill an anticipated vacancy, could not be valid unless authorized by law. 3 Blackf. 158.

It is contended that there was, or may have been, such a case, viz., where a judge, before the election, had made a prospective resignation to take effect after that, and before the next succeeding election.

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After patient reflection, we have not been able to come to such a conclusion.

1. The case does not fall within the letter of the constitution or statutes relative to elections; it does not embrace the material fact of the expiration of the term of office. The elective term of the judicial office is, by the constitution, as we have seen, six years; for that period the successful candidate at an election is chosen; for that period he is disqualified to hold any political office; and for that period he has a right to hold the office of judge. That term of six years cannot expire except by its own limitation. It may be abandoned by the incumbent. It may be vacated of that incumbent by the act of *God*, and by law a new term may be made to then begin; but the term itself can only legally expire by the efflux of time. If, in the case of a prospective resignation, there is an expiration of any term, it is the term attempted to be created by the resignation itself. But such a term is not known to, or contemplated by, the constitution or statutes, and did not in law exist, in this case, if it can in any. This will appear when we consider what a resignation is.

2. To constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment. *Webster* and *Richardson* define the words *resign* and *resignation*, substantially thus: to resign, is to give back, to give up, in a formal manner, an office; and resignation is the act of giving it up. *Bouvier* says, resignation is the act of an officer by which he declines his office, and renounces the further right to use it. *Acc. Wharton*.

Hence, a prospective resignation may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and for the reason that it is not accompanied by a giving up of the office—possession is still retained, and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation—may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted, he may

make the withdrawal by the consent of the authority accepting, where no new rights have intervened. The record nowhere shows us, in this case, that the prospective resignation of Judge *Stuart* was ever accepted; and, therefore, it does not show that any special term, not known to the law, was created by it, if in any event there could have been, which might have been filled at the *October* election.

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3. It will appear beyond doubt, that a prospective resignation does not create a case for an election in *October*, in contemplation of law, when we consider how a resignation is to be made, and the course that is to be afterward pursued in relation to it.

Section 5, chapter 19, 1 R. S. p. 223, requires the resignation of a judge to be communicated to the Governor, and to him alone; and we have been cited to no law, and we know of none, authorizing the Governor to communicate a knowledge of such resignation to any one else, and particularly to the public. And there being no law providing for such communication, the act of the executive, should he make it, would be of no legal effect—would in law, be no notice of the fact, any more than the unauthorized recording of an instrument in writing by the county recorder in his office, would be legal notice of the existence of such an instrument. But the duty prescribed to the Governor, upon the reception of a resignation creating a vacancy in a judicial office, is, to fill the vacancy by the appointment of another person as judge. This is all the notice he is required to give of the existence of the vacancy.

Now, can it be believed for a moment, that it was the intention of the law that there should be an election to fill a vacancy of which the electors might not, necessarily, have any notice? This Court certainly should not, by a strained construction, fix upon the law-making power an intention to open such a door to the practice of trickery—to thus trifle with the elective franchise. Such was not the intention, for by section 2 of the act regulating elections, above quoted, it is made the duty of the various county officers to give notice to the public of all the offices to be filled at the *October* election; and how could they

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give such notice in the case of a prospective vacancy, of which they themselves were not, necessarily, to be notified?

We do not mean to say that their omission to give such notice in a case where by law an election was to take place, at all events, would vitiate the election. We need not decide as to that point. The people take notice of the general laws of the state—of the legal terms of their public officers, and the expiration of those terms—of the general elections to fill them—of the occupancy, by a public officer, of his office by an appointment, and the time of electing his successor; and such notice might be sufficient to render valid an election in such cases. But in the case of a prospective resignation of a judge, under our constitution and laws, the people have not even this description of notice. They do not, necessarily, know anything of such a resignation until it is made public by the actual vacation of the office, and the appointment of a successor.

And if it be conceded that an election to fill an office at the legal expiration of its term—being one of which the law itself is public notice—would be valid without the actual notice required by statute, the fact will not weaken the inference, as to legislative intention, to be drawn from the statutes; for the law expects such actual notice to be given, and it will be an illegal act on the part of the officers if it is not given. Now, could it have been the intention of the legislature that an election should take place in a case where the notice required by statute could not be given—that the officers should be required to give notice of what they had not notice themselves?

We might pursue the discussion of the case, with a view to its further illustration; but it seems to us that sufficient has been said to plainly vindicate the decision we make—to show, indeed, that we could make no other. 3 Kernan, 350.

The election of Judge *Biddle* at the last *October* election was not in a case provided for by law, and was invalid—was a nullity.

We are unwilling to close this opinion without the remark that the resignation of Judge *Stuart* was made and

carried out in good faith; and being so, was in an unobjectionable mode—was indeed eminently proper, as it gave the executive timely notice of his intention to vacate the office on the first *Monday of January*, and afforded ample time for the selection, by the executive, of a successor, before the vacancy occurred, to be appointed afterwards. And for any illegitimate inferences, leading to corresponding action, on the part of others, in relation to the matter, he is in no way responsible.

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Per Curiam.—The judgment is affirmed with costs.

H. O'Neal, O. P. Morton, and J. Coburn, for the appellant (2).

J. E. McDonald and F. Rand, for the appellee (3).

(1) 1 R. S. 260.

(2) Counsel for the appellant cited 3 Kernan, 350; Smith's Comm. § 670 *et infra*, and authorities there cited; 3 Hill, 42; *The Governor v. Nelson*, 6 Ind. R. 496; *Coffin v. The State*, 7 *id.* 157; 4 Selden, 89; 19 Wend. 143; 12 Conn. R. 243.

(3) Counsel for the appellee cited the decision of the U. S. Senate in *Lanman's case*, Gordon's Dig. 1827, appendix, note 1, B; 1 McLean, 509.

HUNT v. THE STATE.

APPEAL from the *Johnson* Court of Common Pleas.

Friday,
January 15.

HANNA, J.—Five persons were prosecuted for a riot. One of them, the appellant herein, demanded to be tried separately. On his separate trial he offered one of his co-defendants, who was willing to testify, as a witness. He was sworn, but objection being made by the prosecutor, his testimony was excluded by the Court. This ruling was erroneous. The third specification of § 90, 2 R. S. p. 372, makes accomplices competent witnesses when they consent to testify. This statute certainly gives a defendant upon trial separately, as in this case, the right to the testimony of his co-defendant who is not yet upon trial.

Nov. Term, 1857. What weight is to be given to the evidence, is a question for the jury. *Marshall v. The State*, 8 Ind. R. 498.—*Eve-*

THE CITY OF LAFAYETTE, &c. *rett v. The State*, 6 *id.* 495.

V. JENNERS. *Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.
F. M. Finch, for the appellant.

10	70
159	122
159	391
10	70
162	545

THE CITY OF LAFAYETTE and MARTIN, County Treasurer
v. JENNERS.

Section 1 of ch. 87 of the Acts of 1855, authorizing incorporated cities and towns to establish public schools within their respective corporate limits, and to levy and collect taxes for their support, is unconstitutional.*

But the constitutional restraint applies only to taxation to pay for tuition: municipal corporations may be authorized to levy and collect taxes to build school-houses; but it seems that in such case the assessment should be for the specific object.

It seems that a charter where acceptance may be necessary, may be inferred to have been accepted; and that if the citizens act under it, their action may be regarded as an acceptance.

The general law of 1857 for the incorporation of cities is not unconstitutional for want of uniformity in the mode of organization, arising out of the diversity of the municipal corporations that might desire or be compelled to avail themselves of its provisions; nor are the organizations under it void for that reason.

Friday,
January 22.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—Application for an injunction. Injunction granted. Appeal to this Court.

The facts of the case are as follows: In 1855, the legislature passed an act entitled “An act to authorize the establishment of free public schools in the incorporated cities and towns of the state of *Indiana*.” The first section of the act reads thus:

“*Be it enacted, &c.*—That the several incorporated cities and towns in this state be and they are hereby authorized

* It seems that the whole act must fall with the first section.

and empowered to establish and support public schools within their respective corporate limits, and by an ordinance of such corporation to levy and collect such taxes as may be necessary, from time to time, for the support thereof," (1).

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Under this section, the city of *Lafayette* levied a tax for the support of public schools within the corporation, and was proceeding to collect it. *Jenners* filed his complaint in the Circuit Court, asking that the city be enjoined from collecting the tax so assessed against him. The injunction, as we have seen, was granted. The sole question presented in the case is, whether the section of the statute above quoted is constitutional; and we can scarcely regard it as an open one.

The act of 1852, 1 R. S. p. 444, § 32, and p. 454, § 130, authorized incorporated cities and towns to levy taxes for the support of public schools, after the public funds had been exhausted; and this Court on all occasions, has held that portion of the act unconstitutional. But what is the difference between it and the section of the act of 1855 which we have quoted? Simply this, and nothing more:—the act of 1852 authorized incorporated cities and towns to levy taxes for the support of their schools, after the public funds should have been exhausted; the act of 1855 authorizes incorporated cities and towns "to levy and collect such taxes as may be necessary, from time to time, for the support" of public schools within their corporate limits. The distinction between the acts is without a difference.

If the legislature cannot, under the constitution, confer upon cities and towns the power to levy taxes to continue the free public schools of the state, how can it confer upon them power to levy taxes to establish and support free public schools? What objection exists to the exercise of the first, that does not exist to the exercise of the second act of power? And what was the objection assigned against the first? It was not that it was conferring upon cities and towns' power that they were not adapted to exercise; but that it was attempting to confer upon them power forbidden to be so conferred by the constitution. It was at-

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tempting to confer upon them power touching a subject as to which the constitution required all power to be exercised by the legislature alone—viz., the subject of furnishing tuition in public schools to the children of the state.

In *Adamson v. The Auditor, &c.*, 9 Ind. R. 174, this Court, in speaking of the law of 1852, said:

“According to the decision in *Greencastle, &c., v. Black*, 5 Ind. R. 557, the provision in that law authorizing township trustees to assess taxes for paying teachers of common schools, is unconstitutional; because the power of voting taxes for that purpose is vested by the constitution in the legislature alone. As to such taxes, the law must be uniform throughout the state. *Quick v. Whitewater Township*, 7 Ind. R. 570.—*Quick v. Springfield Township, id.* 636.”

The new constitution does not contemplate two systems of free public schools in the state—one under the control of the state, and supported by her trust funds and taxes, and another under the control of the various municipal corporations of the state—the cities, towns, townships, counties, school districts—and supported by taxation by them. This would be remitting us back, practically, to precisely the condition we were in under the old constitution and laws, where the state supported a system of public schools, and authorized the counties, &c., severally to raise additional taxes for schools, if they pleased. The consequence was, the legislature shirked the duty of keeping up an efficient system—contented itself with authorizing the municipal corporations to provide schools at their option—and hence we had, on this subject, no uniform rate of taxation—no uniformity of system—no equality of educational privilege—among the children of the state. To remedy this evil—to give us this uniformity and equality—to secure a united and vigorous, instead of a divided and thus weakened, common school system and interest—to place upon the legislature a compulsion to give us these advantages by its own action, instead of hazarding them with the voluntary action of municipal corporations—the new constitution provides that it shall be the duty of the gene-

ral assembly to provide by law for a (one) "general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all." The system must operate equally in city and country, or it would not be uniform. The citizens of the city must be taxed to support it equally with those of the country. Their children must have the right to attend the schools under the system in the city. And if another set of public schools can be maintained in the corporation by taxation, either concurrently with, or in the vacation of, the state schools, then taxation for the support of public schools is not uniform and equal; for such taxes are levied, in effect, by the state, as the city can only levy them by authority delegated to her by the state; and educational privilege is not made equal, to the children of the state—in short, we will not have, as required by the constitution, one uniform system of common or public schools (for the terms in the statutes and constitution are synonymous), supported by equal taxation, and made equally open to all.

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We think the injunction was rightly granted.

It may be observed that the constitutional restraint applies only to moneys raised for tuition. Municipal corporations may be authorized to raise money by taxation to build school-houses, &c.; but, perhaps, the assessment should be for the specific object. Money cannot be raised to pay the salary of teachers.

Another point was made, but it is immaterial in the case. It was, whether the city of *Lafayette* had properly accepted the charter of 1857. A charter, where acceptance may be necessary, may be inferred to have been accepted. If the citizens have acted under the new charter, it might be regarded as an acceptance relating back to the commencement of action under it. See Redf. on Railw. 10.

Per Curiam.—The judgment is affirmed with costs.

R. C. Gregory, H. W. Chase and J. A. Wilstach, for the appellants (2).

W. M. Jenners, for himself.

(1) Acts of 1855, p. 184.

(2) See notes to the opinion on petition for rehearing.

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THE SAME CASE.

THE CITY OF
LAFAYETTE,
&c.

v.
JENNERS.

Monday,
April 6.

ON Petition for a Rehearing.

PERKINS, J.—In this case an earnest petition for a rehearing has been filed; and while the Court consider that the question involved has been so fully presented in the opinions delivered in previous cases in which it has arisen, that its reëxamination is a work of supererogation; yet, respect for the able counsel who ask the rehearing, and for the people of the cities and towns who are so deeply interested in the subject, induces us to depart from the usual practice, in cases where the Court is satisfied with the decision rendered, of simply overruling the petition, and to again briefly review the points presented.

The constitution of *Indiana* ordains that the general assembly shall “provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all.” § 1, art. 8. It also ordains that that “assembly shall provide for the election by the voters of the state, of a state superintendent of public instruction.” § 8, art. 8. Now the question presents itself, what is the meaning to be given to these constitutional provisions?

Judge HOVEY, himself a prominent member of the convention that framed them, as was Judge PETTIT, who decided the case at bar below, in delivering the opinion of this Court in *Greencastle Township, &c., v. Black*, in 1854, said:

“It was evidently the intention of the framers of the constitution to place the common school system under the direct control and supervision of the state, and make it a *quasi* department of the state government.”

Judge STUART, in the same case, said:

“Common schools are thus to be established as a state institution, under the superintendent of public instruction as its official head, and to be supported, as to *tuition*, by state funds.”

Judge GOOKINS, in delivering the opinion of the Court, in 1856, in *Quick v. Springfield Township*, said:

“The people of the state were seeking, by a constitution, to devise a system which should convey the means of instruction [in common schools], equally to every child in the state.” 7 Ind. R. 636.

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And again, in *Quick v. Whitewater Township*, the Court said, that the constitution had “made the [common school] education of the children of the state, a public duty of the state.” 7 Ind. R. 570.

And again, in 1857, in *Adamson v. The Auditor, &c.*, the Court said:

“According to the decision in *Greencastle Township v. Black*, 5 Ind. R. 557, the provision in that law [the school law,] authorizing township trustees to assess taxes for paying teachers of common schools, is unconstitutional, because the power of voting taxes for that purpose is vested by the constitution in the legislature alone. As to such taxes, the law must be uniform throughout the state.” 9 Ind. R. 174 (1).

Thus far the case rests upon the provisions of the constitution we have quoted. They enjoin one general uniform system of common schools; which, to be such, all admit, must operate alike in town and country. No other provision was needed in that instrument to produce such a system.

But it does contain another provision, viz., that the general assembly shall not pass any local or special law providing for the support of common schools. § 22, art. 4.

And the questions arise, why was that prohibitory section inserted? To what was it addressed? What was its design? It was not to establish a general system of common schools; for that had already been plainly provided for. What was its object? What could it be addressed to but city and town schools? We cannot suppose that in so carefully considered an instrument as a state constitution, it was inserted without aim, without some meaning. What was it?

The question is easily answered, when considered in the

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light of history. Under our former constitution, we had had two systems of common schools, the general and the local, and the local had broken down the general system, and neither had flourished. See *Greencastle Township v. Black, supra*. This was an evil distinctly in the view of the convention which framed the new constitution; and it was determined that the two systems should no longer co-exist; that the one general system should be continued, strengthened by additional aids; and that the counteracting local system should go out of existence—should cease.

We have said that under the former constitution, the local school system broke down the general one; and the same would be the result were both tolerated under the present constitution. An ordinary amount of knowledge of human nature, and the motives that govern legislative bodies, must suffice to convince any one of this fact. The constituents of members representing counties having towns and cities which had adopted the local system would, to a great extent, prefer to have no other to interfere with that; they would have no interest in keeping up the general system; and hence, their representatives would naturally unite with the enemies of that system in the legislature, to render it inefficient, merely nominal; and, under such influences, it would wither, if not die. While, on the other hand, if to obtain schools for their own constituents, they were compelled to vote them to all the people of the state, the efficiency and permanency, as well as equality and uniformity of the general system would be maintained.

The question next occurs, is the act of 1855, authorizing cities and towns to pay teachers of common schools by taxation of the citizens, a local law?

The Court is not insensible to the difficulty of determining, in many cases under our constitution, what constitutes such a law. The question is often one of much embarrassment, and few authorities are found to aid in its solution. But in the present case, it would seem that there could be but little difficulty in arriving at a correct conclusion. The subject of the act of 1855, it will be observed, is not the organization of city and town corporations, but the main-

tenance of public or common schools, and taxation for that purpose. And we have seen that common schools as a whole, are made a state institution—a system cöextensive with the state, embracing within it every citizen, every foot of territory, and all the taxable property in the state. The whole territory of the state is divided into school districts, under the general school system, including the towns and cities—they are school districts. Now, a law that is less general than the single subject upon which it is to operate, cannot, as a general rule, certainly, be a general law. But, on the other hand, if it be as general as that subject, it certainly will, as a general rule, be a general law.

Here, as we have seen, the subject is common schools. The subject embraces all the persons and all the property of the state. Yet this law of 1855 operates, and is designed to operate, only upon a portion of the persons and property of the state; to be operative only in a part of the school districts. The state is divided into districts for common school purposes. The cities and towns form a part of the districts, and must do so, to render the school system general and uniform. Now, suppose the school law in terms provided that taxation for common schools, and the management of the system, should be uniform except in that portion of the school districts situated in towns and cities; but that in such districts, a tax, additional to that levied in the rural districts, might be imposed, and a different organization and management of the schools adopted; would any one pretend that the law thus framed was uniform in its operation as required by the constitution, and not local? See *The State v. Barbee*, 3 Ind. R. 258. Yet, such is the school law of the state, if the act of 1855 is a part of it; for the additional taxes levied by cities and towns for school purposes, are levied only by virtue of that law of the state specially authorizing them. It constitutes one law, one scale of taxation, for one part of the school districts, and another for the other part. But here we are met with the argument that cities and towns are, in a measure, independent governments, *imperia in imperio*, and may be indefinitely endowed with the power of taxation.

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We admit that great powers may be conferred upon municipal corporations for corporate purposes within constitutional limits. *The City of Aurora v. West*, 9 Ind. R. 74. But the state cannot confer upon such corporations the right to do that which the constitution forbids to be done by any power in the state.

Yet, by the law of 1855, an attempt to confer such right is made. The constitution provides that common or free public schools shall be supported by state taxation alone—supported, as a state system, by a uniform and general law. Taxes, therefore, levied for the support of such schools, are levied for a state purpose, not a city or town purpose. Now, if the constitution requires all taxes for such purpose to be levied by a general, uniform law, operating alike upon all the persons and property of the state, and forbids the passage of any other, can the state authorize municipal corporations to raise taxes for such state purpose, in addition to those raised by the general law of the state, thus destroying the uniformity of the school system and taxation for its support, and evading the constitutional restriction? If so, surely constitutional checks are worthless. We have not been able, as yet, to reconcile our consciences to this mode of trifling with the fundamental law of the state.

The state legislature cannot charter towns and cities to carry on common schools. They must be carried on by the state. Can the legislature under our constitution, charter cities and towns with the power to create banks?

Here, we might close this opinion; but it is due, perhaps, to counsel, that we should notice two or three inconveniences which it is suggested must arise from this decision.

1. It is claimed that it will annihilate all colleges and academies. This is not so. The constitution limits the general legislation involved in this decision to common schools. Colleges, academies, and charitable associations, are not included within the ordinary or technical meaning of the term common schools. The state is left, by her constitution, free to encourage education, to any extent she may deem expedient, by such agencies.

2. It is said, if cities and towns cannot tax for common schools, neither can they for streets, &c. This is not so. The constitution says laws on the subject of highways shall be general. It does not so provide as to streets, and a highway is not a street, either technically or in common parlance. This has been judicially settled by this Court. *The Common Council of Indianapolis v. Croas*, 7 Ind. R. 9.

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And here we cannot refrain from using the example put, to illustrate the correctness of the decision we have made. The constitution says there shall be one general, uniform system of common schools for all the children of the state, and that no local law shall be passed on the subject.

The constitution does not say that there shall be one general system of highways extending into every part of the state, and that there shall be no other. It simply says there shall be no local laws for opening, working on, and laying out highways, where highways may be needed. The constitution enjoins no system of highways, but regulations as to working, &c. Statutory highways are not needed in cities, because streets there take their place; and streets are recognized in the constitution and statutes as existencies distinct from highways. 1 R. S. p. 52.—2 R. S. p. 339. A general law for highways, where they are needed, like one touching county seats, need only be as general as the particular subject-matter, to comply with the constitution.

3. It is said that schools cannot be kept up in cities without local taxation. We are unable to see why. As the proceeds of taxation are, or may be, drawn from the treasury of the state *per capita*, that is, upon the heads of the children, cities would seem to have the advantage, as the great mass of floating population is within their limits. All this, however, is matter for legislative regulation within constitutional restrictions. It is not a question for the Court.

4. The Court is charged, in annulling this law, with disrespect to the legislature which enacted it. The Court knows its duty, touching this point, and will not hesitate

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to do it. It is the duty of the Court to respect the acts of the other departments of the government—to regard them, *prima facie*, as legal—to hesitate long, and weigh them well before it overthrows them. Those acts constitute, in the language of Judge McKINNEY, in *Hedley v. The Board of Commissioners, &c.*, 4 Blackf. 116, “persuasive arguments;” still they are, in a sense, but arguments, and do not absolve the Court from the obligation to think for itself and decide for itself, in testing them by the paramount law of the land, to which they must conform. See *Noel v. Ewing*, 9 Ind. R. 37.—*Maize v. The State*, 4 *id.* 342.—*Beebe v. The State*, 6 *id.* 501.—*Whiteneck v. The Madison, &c., Co.* 8 *id.* 217.

Another position, briefly alluded to in the former opinion in the case, is urged against the validity of the school tax, viz., that *Lafayette* was not a legal corporation. It is said, the general law of 1857 for the incorporation of cities is unconstitutional, for want of uniformity in the mode of their organization.

We shall not extend our opinion by elaborating this point. The act contemplates, as existing at the time of its passage, four classes of municipal corporations that might desire or be compelled to avail themselves of its provisions.

1. Towns under the management of trustees.
2. Towns under the management of a common council.
3. Cities incorporated with special charters under the old constitution, and continuing to act under such incorporation. See *The City of Aurora v. West, supra*.
4. Cities acting under the previous general laws for the incorporation of cities.

These corporations differed in various particulars, one of which was, the officers by which they were governed. Certain steps were to be taken, in some of them, to bring them under the general law. There could not be uniformity in the officers who were to take these steps, because it did not in fact, exist in the corporate officers of the different corporations; for example, one town had trustees, one a common council, &c.; and there necessarily existed diversity to

that extent, in making the movements necessary to bring themselves under a uniform system of government. This diversity renders neither the law, nor the organizations under it, void.

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Per Curiam.—The petition is overruled, with costs.
Counsel the same as above (2).

(1) See, also, *The Trustees, &c., v. Osborne*, 9 Ind. R. 458, and *Rose v. Bath Township*, *ante*, 18.

(2) By counsel for the appellants :

Before the Court will pronounce a statute invalid, its unconstitutionality must appear beyond doubt. *Maize v. The State*, 4 Ind. R. 342.—*Stocking v. The State*, 7 *id.* 327.—Sedgw. on Stat. and Const. Law, 482.

Where two clauses of the constitution or other text are susceptible of being so construed as to make them harmonious and effectual, the Courts will seek for and adopt such a construction. Sedgw. *supra*, 237, *et seq.*

Where the subject-matter is local, a local law applicable to it is constitutional. *Cash v. The Auditor, &c.*, 7 Ind. R. 227.

The power of taxation can be conferred on municipal corporations in this state by any law that shall be general in its operation in all such municipalities: and such a law would not come within any of the restrictions contained in the constitution of this state.

In the case of *The People v. The Mayor, &c., of Brooklyn*, 4 Comst. 420, this power came under review. In that case, under the charter of the city of Brooklyn, the common council, in the year 1848, caused *Flushing Avenue*, one of the streets of that city, to be graded and paved, at an expense of 20,390 dollars, 25 cents, which, according to a provision in the charter, was assessed upon the owners or occupants of the lands benefited by the improvement, in proportion to the amount of such benefit. After the assessment had been confirmed by the common council, *Griffin* and others, the relators, caused the proceedings to be removed into the Supreme Court of that state, where the proceedings were reversed and the assessment annulled, on the ground that the statute authorizing such assessments was unconstitutional and void. The Court of Appeals reversed the decision, and *Ruggles, J.*, in delivering the opinion of the Court says: "For the purpose of ascertaining what has been deemed, on high authority, the nature and extent of the power of taxation vested in the legislatures of the state governments, I refer to the opinion of the late Chief Justice MARSHALL, in the case of the *Providence Bank v. Billings*, 4 Peters, 514, 561, 563:

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens; and that portion must be determined by the legislature. This vital power may be abused; but the interest, wisdom and

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v.
SIMONS.

justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation.'

"And, again, in *McCulloch v. Maryland*, 4 Wheaton, 428, the following observations are found coming from the same high authority: 'It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the object to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the government acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislature and the influence of the constituents over their representatives, to guard them against its abuse.'

"And, again, at page 430, he speaks of it, as 'unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.'

"Assuming this, as we safely may, to be sound doctrine, it must be conceded that the power of taxation, and of apportioning taxation, or, of assigning to each individual his share of the burthen, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation."

In the case of *The Madison and Indianapolis Railroad Co. v. Whiteneck*, 8 Ind. R., on page 223, PERKINS, J., says: "We proceed, then, to the work of interpretation. In *Prigg v. Pennsylvania*, 16 Pet. on page 610, it is said, that 'perhaps the safest rule of interpretation [of the constitution], after all, will be found to be to look to the nature and object of the particular powers, duties, and rights, with all the light and aid of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as will fairly secure and attain the end proposed.' To the same effect, *Martin v. Hunter*, 3 Cond. R. on p. 557; 1 Kent, 448; *Federalist*, No. 78; *Smith on Statutes*, p. 418, § 276."

REES and Another v. SIMONS and Others.

In a suit upon a promissory note payable to a certain firm, by several plaintiffs describing themselves as partners composing the firm, proof that they constituted the firm is only required where their title as payees of the note is put in issue by some form of pleading verified by affidavit.

APPEAL from the *Hamilton* Court of Common Pleas.

Nov. Term,
1857.

DAVISON, J.—*Benjamin Simons, Ezekiel Simons and Max Thurman*, who describe themselves as partners under the name of *B. & M. Simons & Co.*, sued *Rees* and *McCole* upon a promissory note payable to the order of *B. & M. Simons & Co.* The note is as follows:

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v.
HUFF.

Saturday,
January 23,
1858.

"\$945 00. *Cincinnati, Ohio, May 11, 1854.* Six months after date we, the subscribers, of *Noblesville*, county of *Hamilton*, and state of *Indiana*, promise to pay to the order of *B. & M. Simons & Co.* 945 dollars for value received, without any relief from valuation or appraisement laws. [Signed] *J. H. Rees, S. R. McCole.*"

The defendants answered the complaint by a general denial. Issue being thus made, the cause was submitted to the Court. The note sued on was the only evidence adduced on the trial; and upon that evidence alone, the Court found for the plaintiffs. New trial refused, and judgment.

This judgment is said to be erroneous because there was no evidence tending to prove that the plaintiffs constituted the firm of *B. & M. Simons & Co.* There is nothing in the objection; such proof is only required when the title of the plaintiffs as payees of the note is put in issue by some form of pleading verified by affidavit. *Abernathy v. Reeves*, 7 Ind. R. 306, decides the question under consideration.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

D. Moss, for the appellants.

G. H. Voss, for the appellees.

COWDIN, Auditor, v. HUFF.

The act of 1852 establishing Courts of Common Pleas graduates the salaries of the judges, partly upon population, partly upon territory, and partly upon population and territory combined. Held, that the act is not uniform, within the meaning of the constitution.

The provisoes in § 38 of that act are void.

10 83
147 198

10 83
168 72

10 83
160 618

10 83
161 575

10 83
169 263

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1857.

COWDIN
v.
HUFF.

Saturday,
January 23,
1858.

APPEAL from the *White* Court of Common Pleas.

PERKINS, J.—Motion for a mandate to compel the auditor of *White* county to allow and audit a claim. The statement of the case is as follows:

The appellee served in the office of judge of Common Pleas, for the district composed of the counties of *Tippecanoe* and *White*, one year and nine months. He was paid for his services at the rate of an annual salary of 600 dollars—the respective counties of the district paying at that rate in proportion to their population, that of *Tippecanoe* being 19,377, and of *White* 4,751, according to the last census taken by the *United States*.

The appellee insists, and the Court below held, that he was entitled by law to receive at the rate of an annual salary of 800 dollars, and that the respective counties of the district should have paid him at that rate in proportion to population.

The only question in the case arises upon the 38th section of the “act to establish Courts of Common Pleas,” &c., approved *May* 14, 1852. 2 R. S. p. 23. This section reads as follows:

“Sec. 38. The salary of the judges of Common Pleas shall be graduated as follows, viz.: in districts in which the population is under five thousand, the annual salary of the judge shall be 300 dollars; in districts in which the population is over five thousand, and under eight thousand, the salary shall be 400 dollars; in districts in which the population is over eight thousand, and under thirteen thousand, the salary shall be 500 dollars; in districts in which the population is over thirteen thousand, and under eighteen thousand, the salary shall be 600 dollars; and in all districts where the population is over eighteen thousand, the salary shall be 800 dollars: *Provided*, that in all districts composed of only one or two counties, the salary of said judge shall not exceed 600 dollars per annum. *And, provided, further*, that in districts of more than two counties, said salary shall not exceed 600 dollars, unless the population of such district shall exceed thirty thousand.”

Section 39 provides that the last census or enumeration

taken by the *United States*, or this state, from time to time, shall be taken as the basis upon which to graduate the salaries; that the salary shall be paid quarterly out of the county treasury; and when there are two or more counties in a district each county shall pay in proportion to population.

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1857.

COWDIN
v.
HUFF.

By the third section of the "act to authorize and limit allowances," &c., 1. R. S. p. 101, it is made the duty of the auditor to draw his warrant upon the treasurer, when the amount, time of payment, and the person to whom payable are fixed by law.

The appellee argues that the proviso in section 38 limiting his salary to 600 dollars, because the district of which he was judge contained only two counties, while the population was over 18,000, is void, as being in conflict with art. 4, §§ 22 and 23 of the constitution, prohibiting local or special legislation upon the subject of fees and salaries, &c., and requiring all laws to be general and of uniform operation throughout the state.

There are now, and were, at the adoption of our constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries and wages. These modes are all different, each from the other; and the difference between them has been immemorially well understood.

FEES are compensation for particular acts or services; as the fees of clerks, sheriffs, lawyers, physicians, &c.

WAGES are the compensation paid, or to be paid, for services by the day, week, &c., as of laborers, commissioners, &c.

SALARIES are the *per annum* compensation to men in official and some other situations. The word *salary* is derived from *salarium*, which is from the word *sal*, salt, being an article in which the *Roman* soldiers were paid. See [the dictionaries of] *Richardson*, *Webster*, *Bouvier*, and *Wharton*.

Where the constitution does not provide otherwise, the state may adopt either of these modes of compensating those who may be in her service. But where that instru-

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HUFF.

ment does prescribe a mode, that mode must be followed. It does provide, in effect, that judges of the Supreme and Circuit Courts shall be paid by salary. Art. 7, § 13. It makes no provision as to the compensation of judges of the Court of Common Pleas. These judges, therefore, might be paid by fees, as are justices of the peace; or by *per diem* allowance, wages, as were the Probate judges under the old constitution; or by salary, as are the present judges of the Circuit and Supreme Courts. But if the mode by fees or salary be adopted, the law must be uniform—if by fees, the fees must be the same, for the same acts, to all the judges; and if by salary, it would seem that the salary must be the same to all the judges. Could the legislature make a distinction, in point of salary between the judges of the Supreme Court? Could they make such distinction between the judges of the Circuit Court?

It would seem that, for the compensation by salary, of the same class of officers, the law, to be general and uniform, must give to each the same compensation. The constitutional provision, it will be observed, does not embrace duties to be performed, but requires uniformity in salary where it is given, or in scale of fees, where they are allowed.

It would seem, therefore, that a law for paying, by salary, the judges of the Court of Common Pleas, to be general and uniform, should fix the same compensation for each and all of them. But, however this may be, we are clear that a law which graduates the salary of a part of those judges upon population, a part upon territory, and a part upon population and territory combined, is not uniform within the meaning of the constitution. And as the present case involves the validity of the two provisoes in the 38th section only, we limit our decision accordingly, and simply declare them void.

Per Curiam.—The judgment is affirmed with costs.

J. D. Cowdin, for the appellant.

S. A. Huff, for the appellee.

Roots and Another v. TYNER and Another.*

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1857.

Roots	10	87
	127	56
V.	10	87
TYNER.	168	161

An instruction inaccurately worded, and erroneous as an abstract proposition, is nevertheless right, if it is correct in its application to the evidence, and not calculated to mislead the jury.

An appellant cannot assign as error an instruction in his favor.

An instruction prayed should be based upon facts assumed to be proved by all the evidence bearing upon them, and not by a portion only of the evidence.

The Court must decide the effect and sufficiency of evidence where the evidence offered can legally produce but one result; but the Court will not assume that but one effect will be produced by the evidence upon a given point, unless such evidence has a fixed legal import, and is such that no other inference can be drawn from it.

An instruction too narrow to cover the merits of the case, should be refused.

The Court is not bound to give an instruction unless it ought to be given precisely as prayed.

APPEAL from the *Franklin* Circuit Court.

Tuesday,
November 25,
1856.

GOOKINS, J.—*Tyner* and *Roberts*, the plaintiffs, were millers, residing at *Brookville*, *Franklin* county, *Indiana*, and *Roots* and *Coe*, the defendants, were commission merchants, residing at *Cincinnati*, *Ohio*. In *May* and *June*, 1851, the plaintiffs consigned to the defendants 38 barrels of flour, and in the fall of 1854, they forwarded to them 145 barrels, for sale. This action was brought to recover the value of the two consignments, alleging a special demand and refusal to account.

The defenses were, that the first lot was not received by the defendants; and, as to all, that they had fully accounted and paid over the proceeds.

There was a jury trial—verdict for the value of both consignments—new trial refused, and judgment.

The controversy grew out of the manner of keeping the accounts by *Roots* and *Coe*, and the insolvency of *Tyner*, one of the plaintiffs.

Previous to *February*, 1850, several different firms, of each of which *Tyner* was a member, and seems to have been the managing partner, had dealings with the defend-

* The opinion in this case has been held back on petition for a rehearing since the date in the margin. The petition was overruled *May* 8, 1858, and the judgment reaffirmed.

Nov. Term,
1857.

Roots
v.
TYNER.

ants, and with a previous firm of which they were successors. The defendants kept separate accounts with each of the firms. In *February*, 1850, the manner of keeping the accounts was changed at the request of *Tyner*, and from that date they were kept in his name. All receipts from either of the firms were credited to *Tyner*, and all disbursements to or on account of either, or of *Tyner* individually, were charged to him. There was evidence tending to show that this was done with the consent and approbation of *Roberts*. *Roots* and *Coe*, in their record of sales, kept an account of their transactions with each of the several firms. The evidence tended to show that *Roberts* directed a specific appropriation of the proceeds of sales of the 145 barrels forwarded in *November*, 1854, which order was afterwards countermanded by *Tyner*, at the request of *Roots* and *Coe*, and without the knowledge of *Roberts*; and the proceeds of the sales of the flour were carried to the credit of *Tyner*, who soon after failed, there being a large balance due to the defendants from *Tyner*, on his general account with them. He was also largely indebted, at the time of his failure to his copartner, *Roberts*, at whose instance this suit is evidently prosecuted in the name of the firm.

It is not contended by the appellants in this Court, but that there was sufficient evidence to sustain the verdict, if the jury were rightly instructed. The errors assigned are upon instructions given and refused. The following were given by the Court of its own motion:

1. If you believe from the evidence, that the 13 and 25 barrels of flour were delivered by the plaintiffs to the defendants, at their commission house in the city of *Cincinnati*, you will find for the plaintiffs the amount the flour is worth from the evidence, unless you believe it was passed to the credit of *Tyner* and *Roberts*. If you believe the flour was not delivered to the defendants, you will find for the defendants.

2. If you believe, from the evidence, that the firm of *Tyner* and *Roberts* were doing business with *Roots* and *Coe*, as commission merchants, and that *Tyner* had all the business of the firm of *Tyner* and *Roberts* done with *Roots*

and *Coe* in the name of *Tyner* alone, by the knowledge and consent of *Roberts*, and that it was acknowledged by *Roberts* that *R. Tyner* was the financial agent of the firm of *Tyner* and *Roberts*, and that all the moneys due the firm were credited and paid to *Tyner*, and that all the debts due from the firm of *Tyner* and *Roberts* to *Roots* and *Coe*, were charged to the individual account of *Tyner*, and paid by him, and that *Tyner* was in the practice of using his individual name for the purpose of procuring money for the use of the firm of *Tyner* and *Roberts* from *Roots* and *Coe*, or from others, to the knowledge of *Roots* and *Coe*, and they furnished *Tyner* advancements in money or bills of acceptance, and *Tyner* ordered the 145 barrels of flour to be passed to his individual account, it would authorize *Roots* and *Coe* to pass to the credit of *Tyner* the value of the flour, and you should find for the defendants.

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TYNER.

The first of these instructions is not as accurately worded as would have been proper; but taken in connection with the evidence, we do not think it could have misled the jury. It is complained that by the use of the word "is" the jury were directed to take the value of the flour at the time of trial as the measure of damages; but that word was used in immediate connection with a reference to the evidence of value; and no evidence was given of its value at the time of trial, but its value when delivered was proved. It is also complained that the jury were improperly directed to find for the plaintiffs the value of this flour, unless it was carried to the credit of *Tyner* and *Roberts*. We think the meaning of the Court was, that the jury should find, as to that flour, for the plaintiffs, unless they had received the benefit of it. The contest in respect to these two lots of flour, constituting the first consignment, was, whether the defendants had received it. To that point the testimony was addressed, and a witness brought to prove the delivery was sought to be impeached. The account rendered by the defendants contained no credit for it. With this evidence before them, we think the jury would put the construction that we have put upon the charge. It is further complained, that the jury was directed to find for the

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v.
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plaintiffs, unless *Tyner* and *Roberts* had been credited with the proceeds of the flour, although there may have been a general balance against them. In respect to this, we repeat what we have already said. The Court and jury were not dealing in abstractions. They had the evidence before them, and in view of it, any jury, we think, would have been led to consider that which applied to the controversy involved in this part of the case—did the defendants get the flour? If they did, have they accounted for it? An instruction is right if correct in its application to the evidence, although it might be erroneous as an abstract proposition. *Shook v. The State*, 6 Ind. R. 113 (1).

Upon the second instruction, the appellants cannot assign error. It is in their favor. They complain that it imposed too many restrictions on their right to a verdict. The jury were told that if certain facts were proved they must find for the defendants; not, that if certain facts were not proved they must find for the plaintiffs. The point sought to be made upon this instruction could only have been raised by the defendants by praying an instruction which did not impose so many restrictions upon their right to a verdict, and excepting to the refusal to give it.

The following instructions were prayed by the defendants, and refused by the Court:

“1. That if the jury believe, from the testimony, that the facts with respect to the disposition made by defendants, of the proceeds of the 145 barrels of flour, by the plaintiffs consigned to the defendants for sale, in *October* and *November* last, are as testified to by Mr. *R. Tyner* and the clerk of the defendants, in his deposition, the defendants were justified in making the disposition which they did make of such proceeds, and are not liable again to account to the plaintiffs therefor.

“2. If *Roots* and *Coe* did receive the 38 barrels of flour in controversy, they ought, if such was the usual course of dealings between the parties, to have credited the *R. Tyner* account with the proceeds; and if the only result of giving that credit would be to reduce the balance which stood to the debit of that account, on the first of *Octo-*

ber, 1854, the plaintiffs cannot recover in this suit therefor."

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1857.

The first of these is objectionable, because its effect, if given, would have been to draw the attention of the jury from the other evidence in the cause, and to induce them to base their verdict on that of two only out of a number of witnesses. This was improper. *Lawrenceburg, &c., Railroad Co. v. Montgomery*, 7 Ind. R. 474. An instruction prayed should be based upon a state of facts assumed to have been proved by all the evidence bearing upon it, and not by a portion only of the evidence.

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v.
TYNER.

The second instruction prayed by the defendants, was rightly refused. There are some cases in which it devolves upon the Court to decide upon the effect and sufficiency of evidence (*Crookshank v. Kellogg*, 8 Blackf. 256.—*Haynes v. Thomas*, 7 Ind. R. 38); but this is where the evidence offered can legally produce but one result. The Court cannot be asked to assume that but one effect will be produced by the evidence upon a given point, unless such evidence has a fixed legal import, and is such that no other inference can be drawn from it. As already stated, the contest concerning the 38 barrels was, whether it had been delivered to the defendants, their account with *Tyner* containing no credit for it. That account, though kept with *Tyner*, and with the assent of *Roberts*, was often shown to the latter, as testified by the defendants' clerk. The account, as given in evidence, showed monthly balances from *February*, 1850, to *November*, 1854, and was proved to have been frequently rendered to *Tyner*, of which rendering, it is fair to presume, the several firms of which *Tyner* was the managing partner had the benefit. From the manner in which the business was transacted, the jury might have inferred that the keeping of the accounts on both sides was intrusted mainly to the defendants, and that if the account shown to *Roberts* had contained a credit for the proceeds of this flour, it would not have remained three and a half years without being settled in such a manner that *Roberts* would have got the benefit of it.

The instruction was properly refused, we think, for an-

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1857.

ROOTS
v.
TYNER.

other reason. The object of it was to secure a verdict for the defendants in respect to the 38 barrels of flour, by the solution of an arithmetical proposition which did not necessarily involve the merits of the case. Suppose the jury had found that the usual course of dealings between the parties would have been to credit the "*R. Tyner* account" with the proceeds of the flour, and had then imagined, contrary to the proof, that that had been done, and that this amount had been carried down through the various balances, and had been in that way finally subtracted from the balance on that account in favor of the defendants,—that would not have been conclusive of any question of right between the parties, regardless of the other evidence in the cause. It is a favorite resort of the practitioner to endeavor to secure a verdict by fixing the attention of the jury upon a single proposition. We do not mean to condemn that practice; but he that will do so must see that his proposition is broad enough to cover the merits of the case. The jury might have been misled by the instruction, and the Court is not bound to give an instruction unless it ought to be given precisely in the terms prayed.

Upon the whole case, we conclude that the judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

P. L. Spooner and *J. Ryman*, for the appellants.

J. D. Howland and *G. Holland*, for the appellees (2).

(1) See, also, *Thompson v. Thompson*, 9 Ind. R. 323; *Shaw v. Saum*, *id.* 517; *Jolly v. The Terre Haute Drawbridge Co.*, *id.* on p. 423, and cases cited.

(2) Counsel for the appellees, in a supplemental brief, cited *McCall v. Seavers*, 5 Ind. R. 187; *Short v. Scott*, 6 *id.* 430; *Vanuxen v. Rose*, 7 *id.* 222, to the point that the verdict being right on the weight of evidence, the law of the case as given by the Court to the jury is wholly immaterial.

The original briefs were missing.

BOOE v. THE JUNCTION RAILROAD COMPANY.*

Nov. Term,
1857.BOOE
v.
THE JUNC-
TION RAILR'D
COMPANY.

Where two or more railroad companies, with the consent of the legislature, granted subsequently to the subscriptions of stock, but without the consent of the stockholders, consolidate their separate existences into one, non-consenting stockholders are released, and may withdraw from the corporation.

It seems, that such consolidation does not necessarily dissolve the corporation.

Where the original charter of a railroad company, in such a case, provided that the legislature might make such amendments to the charter as the company might at any time desire,—*held*, that the amendments contemplated were such as might facilitate the construction of the road provided for in the charter, and not such as would, in effect create a new company, for a different purpose. The word *company*, as there used, probably means the stockholders.

APPEAL from the *Fayette* Circuit Court.

Wednesday,
December 2.

PERKINS, J.—This suit involves the question decided in *McCray v. The Junction Railroad Co.*, 9 Ind. R. 358. That question is, whether two railroad companies, by consent of the legislature, granted subsequently to the subscriptions of stock, but without the consent of the stockholders, can consolidate their separate existences into one. It is admitted that they can do it with such consent. This Court has held that they cannot without. A stockholder, not consenting, may withdraw from the corporation. Such consolidation does not necessarily dissolve the corporation, it seems, but releases non-consenting stockholders.

We adhere to the decisions heretofore made. We think, as a general proposition, that corporations cannot, unless authorized by their charters, enter into partnerships. If not, they cannot consolidate, as was attempted to be done in this case. See *Stevens v. The Rutland, &c., Co.*, 1 Am. L. Reg. 154, where the cases are reviewed.—*Carlisle v. The Terre Haute and Richmond Railroad Co.*, 6 Ind. R. 316.—*Sparrow v. The Evansville, &c., Co.*, 7 Ind. R. 369.—*Fisher v. The Evansville, &c., Co.*, *id.* 407.—Redf. on Railw. 91 (1).

* The opinion in this case was delivered at the date in the margin, but it was afterwards recalled, and the case reconsidered. It was finally returned April 6, 1858.

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1857.

Booe
v.
THE JUNC-
TION RAILR'D
COMPANY.

The original charter of the company, in the case at bar, contained this section: "Should the company at any time desire any amendment to this act, it shall be lawful for the legislature to make the same."

As to this clause, we think the most reasonable construction of it is, that it simply contemplated amendments that might facilitate the construction of the road provided for in the charter, and not such as should, in effect, create a new company for a different undertaking. Again, the amendment must be one desired by the company, which, probably, in that section of the charter, means the stockholders.

No doubt the two companies could form a through connection for running their roads, each retaining its own organization, defraying its own expenses, and receiving its own profits.

The judgment below must be reversed, and the cause remanded for another trial, in which the question whether the appellant had expressly, or by implication, assented to the consolidation may be determined.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Fay, for the appellant.

S. W. Parker and *J. C. McIntosh*, for the appellees.

(1) See, also, *Pierce's Amer. Railr. Law*, 89 to 99.

END OF NOVEMBER TERM.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1858, IN THE FORTY-SECOND
YEAR OF THE STATE.

DRAGGOO v. DRAGGOO.

The defendant, in this case, claimed as a set-off the amount of a note made jointly by the plaintiff and himself, alleging that he, defendant, was only surety, and that he had paid the whole note. To prove this, he called the plaintiff as a witness. Plaintiff testified that defendant had paid the note, and then went on to testify to a series of arrangements between him and defendant, by which he had satisfied the latter. Defendant then offered himself as a witness touching these further facts, but he was rejected. *Held*, that he should have been admitted.

APPEAL from the *Lagrange* Court of Common Pleas. *Monday, May 24.*
Per Curiam.—In this case the defendant called the plaintiff as a witness to answer three inquiries. He answered them, and then proceeded to state further facts. The defendant then offered himself as a witness as to those further facts. He was rejected. The statute is that, “any party examined by an adverse party may testify in his own behalf in respect to any matter pertinent to the issue; but if he testify to any new matter not responsive to the inquiries put to him by the adverse party, such adverse party may offer himself as a witness on his own behalf in respect

May Term, 1858. to the new matter, and shall be received." 2 R. S. p. 96, § 300.

THE INDIANA
CENTRAL
RAILWAY CO.
v.
BODEN.

It is not easy to determine, in every case under this provision, what shall be regarded as new matter. The testimony must all be pertinent to the issue, still, though thus pertinent, it may be new matter. It must be responsive to the question put, or it will be such matter. But how wide a range of explanatory facts may be given in response to an inquiry? This is the difficulty.

Here, the defendant claimed, as a set-off to the plaintiff's suit, the amount of a note made jointly by the plaintiff and defendant to a third person. The defendant claimed that he paid the whole of the note, that he was but a surety on the note, and, hence, was entitled to the whole amount. One step in making out his case would be to prove that he paid the whole of the note. To prove this, he called the plaintiff, and asked him who paid said note. He replied that the defendant paid it. He then went on to testify to a series of arrangements between him and the defendant, by which he had satisfied the latter, &c.

We think this was new matter, and that the defendant should have been allowed to testify (1).

The judgment is reversed with costs. Cause remanded, &c.

A. Ellison, for the appellant.

(1) See *Thompson v. Shaefer*, 9 Ind. R. 500.

THE INDIANA CENTRAL RAILWAY COMPANY v. BODEN.

It is only where this company has taken possession of or appropriated property in the construction of her work, that they may be sued for damages in the mode prescribed by § 3 of the act of January 13, 1849, amendatory of the act of incorporation.

But a railroad company is liable for an injury resulting from the construction of their work, as at common law, where no remedy is given by the charter.

APPEAL from the *Wayne* Circuit Court.

May Term,
1858.

DAVISON, J.—This suit was commenced before a justice of the peace, under the act incorporating the railway company. The complaint alleges that *Boden*, who was the plaintiff, is the owner of lots 9, 10, 11, 12 and 13, in block 14 in *Cambridge City*; that the company had seized upon the lots, rendered them useless to the owner, and appropriated them to her own use. It is averred that the plaintiff is greatly injured; that he has sustained damage to the amount of 1,500 dollars; and, therefore, he makes complaint, &c. Pursuant to the act, the parties selected arbitrators, who returned an award, upon which the justice rendered judgment. The company appealed.

THE INDIANA
CENTRAL
RAILWAY CO.
V.
BODEN.

Monday,
May 24.

In the Circuit Court, the jury, to whom the cause was submitted, found specially as follows: That the company located and constructed her railway on and upon a certain street in *Cambridge City*, upon which street the plaintiff's lots bound and front, and has erected an embankment immediately in front of said lots, so high above the former level of the street as to cause the water and dirt to run and slide down from the embankment to and upon the lots, thereby hindering egress and regress from them to and along the street. And further, the jury found generally for the plaintiff, and assessed his damages at 125 dollars. The defendant moved for a new trial and in arrest; but her motions were overruled, and judgment rendered, &c.

Section 3 of the act of incorporation to which we have referred, provides, *inter alia*, that, in all cases where the owner of lands, stone, wood or other materials, necessary for the use and construction of said road, shall refuse to relinquish the same, or accept a fair compensation therefor, it shall be lawful for the corporation, by their agent, &c., to enter upon, take possession of, and use the same, avoiding, in all cases, unnecessary damage to the owner; and where such owner may feel aggrieved or injured in consequence of such use of his land, &c., he shall make written complaint before the nearest justice of the peace, setting forth the nature and locality of the injury, &c., whereupon, such justice shall require the president of the company to

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1858.

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appoint one disinterested appraiser, and the complainant another, which appraisers, so appointed, shall, upon computation of the damages, make up their award, and report the same to the justice, &c. Local Acts 1849, p. 92.

Does the remedy thus prescribed embrace the case made by the record? This is the only question before us.

The special verdict does not allow the conclusion that the lots described in the complaint, or any part of them, were seized and appropriated to the use of the company, nor does it appear that they were entered upon and used, within the meaning of the statute. The embankment in front of the plaintiff's lots is evidently an obstruction to his easement in the street; but for such injury the statute contemplates no remedy. It is only where the company has taken possession of and appropriated property in the construction of her work, that its owner is allowed to sue for damages in the mode prescribed by the act of incorporation.

Still, the plaintiff is not without remedy; because it has been often decided that a railroad company, for an injury which necessarily results to private property from the construction of her work—there being no remedy given by her charter—is liable as at common law. *Tate v. The Ohio and Mississippi Railroad Co.*, 7 Ind. R. 479.—*Hutton v. The Indiana Central Railway Co.*, *id.* 522.—*The Evansville, &c., Railroad Co. v. Dick*, 9 Ind. R. 433 (1).

The plaintiff, having improperly instituted his suit under the act incorporating the company, and the damages claimed being an amount to which a justice's jurisdiction does not extend, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs.

C. H. Test, J. S. Newman and J. P. Siddall, for the appellants.

(1) See the argument of counsel in this last case, 9 Ind. R. 437, *et seq.*

HOWARD v. THE STATE on the relation of VAWTER.

May Term,
1858.HOWARD
v.
THE STATE.

The act of 1855 (ch. 11) "to fix the commencement of the terms of certain county officers, and to render the same uniform," conflicts with § 2 of art. 6 of the constitution, and is therefore void.

APPEAL from the *Benton* Circuit Court.Monday,
May 24.

10	99
135	181

10	99
151	563
151	564
151	565
151	570

10	99
168	168

10	99
171	629

DAVISON, J.—This was a proceeding by writ of mandate against *Howard*, the clerk of the *Benton* Circuit Court. The affidavit upon which the writ is founded alleges, *inter alia*, that one *Theophilus Stembell* was, at the annual election in *October*, 1854, elected treasurer of *Benton* county, for the term of two years, commencing on the 15th of *August*, 1855, and terminating on the 15th of *August*, 1857; that *Stembell* was duly commissioned, &c., as treasurer, and on the 15th of *August*, 1855, commenced the discharge of the duties of that office, and still is acting as such treasurer; that a general election was held in said county, on the second *Tuesday* of *October*, 1856, at which *Vawter*, the relator, was a candidate for treasurer, and, having received a large majority of the votes cast at that election, was duly elected treasurer of said county, and his election to that office was declared by the board of canvassers, and certified to *Howard* as clerk, &c., on the *Thursday* succeeding the election. The affidavit further alleges that *Howard*, as clerk, &c., has failed and refused to make out a statement specifying the number of votes given to *Vawter* for said office, and transmit the same to the secretary of state, &c.

Upon this affidavit, the Court ordered an alternative mandate against *Howard*, commanding him to make out and transmit a statement of the votes cast for *Vawter* as treasurer, &c., to the secretary of state, or to appear and show cause why a peremptory mandate should not issue against him, &c.

The answer to the alternative mandate admits the date of *Stembell's* election, his commission, and the commencement of his term of office, as stated in the affidavit; but alleges that *Howard* did refuse, and still refuses, to make

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v.
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out and transmit to the secretary of state a statement of the number of votes cast for *Vawter*; because, by an act of the legislature entitled "An act to fix the commencement of the terms of certain county officers, and to render the same uniform," approved *March 3, 1855*, *Stembell* is entitled to hold the office of treasurer until the first *Monday* in *November, 1857*. It asserts that the election of *Vawter* was illegal, and that no legal election could be held for that office until the general *October* election for 1857.

The act referred to provides, first, that the terms of office of the sheriff, treasurer, &c., "shall commence on the first *Monday* of the month of *November* immediately following the general *October* elections, and that any of the above-named officers to be elected hereafter shall hold their offices until the first *Monday* of *November* aforesaid, according to their respective terms." Secondly, "That whenever any of the aforesaid officers shall have been elected at the *October* election of 1854, said election shall be, and is hereby, declared valid, and they shall enter upon the discharge of the duties of said offices at the expiration of the term of the present incumbent, and hold as provided in the first section of this act." Acts 1855, p. 52.

To the answer there was a demurrer sustained, and a peremptory mandate was ordered, &c.

The answer, no doubt construes the act correctly. Under it, the relator could not be entitled to the office on the first *Monday* in *November* immediately following his election; because there was then an incumbent whose term had been by the act itself extended to the first *Monday* of *November, 1857*. Hence, there could not, in view of the act, have been a legal election of a successor to *Stembell* until the second *Tuesday* in *October* immediately preceding the expiration of his extended term. But it is insisted that the act in question conflicts with § 2 of art. 6 of the constitution, and is therefore a nullity; and that, under the general election law of 1852, *Stembell's* term ended on the 15th of *August, 1857*, at which period *Vawter*, having been elected in *October, 1856*, was entitled to the office. 1 R. S. p. 260.

The constitutional provision to which we are referred, is as follows: May Term,
1858.

“There shall be elected in each county, by the voters thereof, at the time of holding general elections, a clerk of the Circuit Court, auditor, recorder, treasurer, &c. * * * HOWARD
V.
THE STATE.
The treasurer, &c., shall continue in office two years; and no person shall be eligible to the office of treasurer, &c., more than four years in any period of six years.”

Thus, the term of the office of treasurer is fixed. And though it be conceded that the legislature may have the power to fix the time at which such term shall commence, still, in order to effect that object, they are not authorized either to shorten or lengthen it. This construction is well supported by another provision. Section 2 of art. 15 says: “When the duration of any office is not provided for by the constitution, it may be declared by law;” and thereby clearly implies, that when such duration is limited by the organic law, it cannot be changed by legislation. But the appellant argues thus: “If the legislature have the power to designate the time at which the regular term of the office of treasurer shall commence, and the time fixed would cause a vacancy in that office, they have the power to provide by enactment for the filling of any such vacancy.” The answer to this is, that the term being expressly limited by the constitution, the legislature have no power to enact a law which, in its effect, would create a vacancy. It is true, they may provide by general law for the filling of vacancies that may occur; but that purpose is not indicated either in the title or provisions of the act before us. Applied to this case, it affirmatively extends a term of office beyond the limit fixed by the constitution, and must, therefore, be held invalid. We are unanimously of opinion that *Vawter* was entitled to the office upon the expiration of two years from the 15th of *August*, 1855. The judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

J. L. Miller, for the appellant.

R. C. Gregory, *H. W. Chase* and *J. A. Wilstach*, for the state.

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1858.

HILL v. BRINKLEY.

HILL
v.
BRINKLEY.

10 102
147 139

The Court, on motion, will set off judgments of the same or of different Courts.

Where one of the judgments thus set off has been assigned, the Court will not except the amount of a lien thereon of which the assignee had no notice.

In this state, attorneys have no general lien on judgments for fees.

Monday,
May 24.

APPEAL from the *Grant* Court of Common Pleas.

PERKINS, J.—Motion to set off judgments. Motion sustained.

It appears that *David Hill* obtained a judgment against *Spencer Brinkley*. Subsequently, *Brinkley* became the owner, by assignment to him from one *Jones*, of a judgment in the same Court, against *Hill*. *Brinkley* moved that the Court order the latter judgment to be set off against the former, and the former to be entered as thereby satisfied. The Court did so. This was right. The Court will thus set off judgments in the same, and in different Courts. 2 Swan's Pr. p. 999.

While the motion was pending, the attorneys for *Jones* gave notice that they claimed a lien of 50 dollars, on the judgment assigned to *Brinkley*, by him, and asked the Court to except that amount out of the operation of the order of set-off. The Court did so. This was wrong.

1. It was wrong because *Brinkley* had purchased and received the assignment of the whole judgment without any notice, given expressly, or constructively by noting the claim for a lien upon the record.

2. Because, in this state, attorneys have no general lien upon judgments for fees. In *England*, and in some of the states of the *Union*, attorneys have such a lien for taxable costs; but these are different from attorneys' fees. These taxable costs, here, go to the clerks and other officers, not to attorneys. Neither statute nor usage, in this state, gives attorneys a lien upon judgments for their fees.

But no error is assigned as to this point.

Per Curiam.—The judgment is affirmed with costs.

I. Van Devanter and *J. F. McDowell*, for the appellant. May Term,
1858.

J. Brownlee, *A. Steele* and *H. D. Thompson*, for the appellee. SLAUGHTER
v.
DETINEY.

SLAUGHTER and Another v. DETINEY.

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Seemle, that a man cannot mortgage land to one of his creditors, who is willing to give him time—his wife not joining in the mortgage—and let his other creditors sell his other property to pay their claims, and then select the mortgaged property as exempt from execution, as against the mortgagee, when he shall seek to foreclose, as well as against the other creditors; nor can the right to select a portion out of many articles of property, render any article actually exempt till the selection has been made.

Where an execution-defendant claims land as exempt from execution, and selects a freeholder as an appraiser, and such freeholder is not a householder, the sheriff must choose an appraiser for him.

Where land mortgaged to secure a debt was, after being claimed as exempt from execution, sold under a decree of foreclosure, and the mortgagee brought suit to recover possession,—*held*, that the execution-defendant, in his answer, need not negative that the mortgage was given to secure the payment of purchase-money; but that the plaintiff must set this up in his reply.

A paragraph of an answer purporting to answer the whole complaint, but really answering but a part of it, is bad.

APPEAL from the *Harrison* Circuit Court.

PERKINS, J.—Suit for the recovery of sixty acres of land alleged to be in the possession of the defendant, *Detiney*. *Monday,*
May 24.

Answer, 1. Denying generally the complaint; and, 2. Alleging that on, &c., the defendant, *Detiney*, and one *Lawrence*, were the joint and equal owners of said sixty acres; that, being so, they mortgaged them to *Terry & Co.*, to secure a debt contracted after the 4th of *July*, 1852; that the wife of *Lawrence* joined in the mortgage, while the wife of *Detiney* did not; that subsequently, *Terry & Co.* foreclosed the mortgage, obtained a decree for the sale of the mortgaged premises, the wife of *Detiney* not being a party thereto, and that the lands were sold under the decree, the

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1858.

SLAUGHTER
V.
DETINEY.

plaintiffs in this suit becoming the purchasers; that before the sale, defendant, *Detiney*, claimed the land as exempt from execution, demanded its appraisement, and selected a freeholder on his part to aid in making it, &c. The defendant alleges that the plaintiffs purchased with notice, that his wife is still living, and that he was and is a resident householder, &c.

A demurrer was overruled to this paragraph of the answer, and final judgment was rendered for the defendant.

It is provided in 2 R. S. p. 337, that any resident householder may select from his real and personal property 300 dollars' worth which shall be exempt from execution.

The third section of the act is as follows:

"No mortgage or sale of any real estate, exempted under the provisions of this act, shall be valid if executed by a married man, unless the deed be acknowledged by the wife in due form of law."

The second paragraph of the answer above set out, was drawn with reference to this section; but the appellant contends that the section does not apply to the case. He insists that it relates only to property that has been claimed and allowed as exempt from execution before it is mortgaged; that the mortgage, to be rendered void, must be executed upon property then actually exempt. There is certainly much strength in the position taken. By the statute, a debtor has a right to select, out of all his property, particular pieces to the value of 300 dollars, leaving the balance to be sold to pay debts. *Austin v. Swank*, 9 Ind. R. 109. And it is easy to see, that if a man, his wife not joining, may mortgage to one creditor, who may be willing to give him time, a piece of land, and let his other creditors sell his remaining property to pay their claims, he selecting the mortgaged property as exempt from sale on execution, both against his other creditors, and also against the mortgagee when he shall seek to foreclose, great injustice and hardship may be occasioned. It would seem to be invalidating by a subsequent act, what was before valid. Nor, it would seem, can the mere right to select a portion, out of many articles of property, as exempt, render any

article actually exempt till the selection has been made. But we regard this point as of too much importance to be settled till after it has been fully discussed; and we have seen no brief upon it from the appellee. We shall therefore leave it wholly undetermined, as the case must go back upon another point (1).

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1858.

SLAUGHTER
v.
DETINBY.

It is further objected that the paragraph is bad because it alleges the selection of a freeholder as an appraiser, when the statute requires a householder. It is true that a freeholder may not be a householder, and hence, not a legal appraiser; but the statute further provides that if the execution-defendant fails to select an appraiser, as provided by statute, the sheriff shall select for him. This he should have done. It is also insisted that the paragraph is bad because it does not negative that the mortgage was given to secure purchase-money of the mortgaged lands, &c.

But as this exception, if it be such, in the statute, is contained in a subsequent, independent section, to that relied on in the answer, we think it need not be negatived therein, but should be set up by way of reply. See *Sorden v. Gatewood*, 1 Ind. R. 107.

Another objection to the paragraph of the answer under consideration is, that it purports to answer the whole, and actually answers but a part, of the complaint. This is a valid objection. The suit is against the defendant to recover the entire sixty acres of which he is in possession. The paragraph is pleaded as an answer to the whole cause of action. It sets up, in fact, no bar to one half of that cause, even if valid (which we do not decide) as to that. The defendant alleges a title to but an undivided half of the land. *Beagles v. Sefton*, 7 Ind. R. 496.—2 R. S. p. 167, § 600.

Per Curiam.—The judgment is reversed with costs. Cause remanded for further proceedings, with leave to amend.

W. T. Otto and *W. Q. Gresham*, for the appellants.

R. Crawford, for the appellee.

(1) See *Vandubur v. Love*, ante, 54.

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1858.

SMITH v. THE STATE.

SMITH
v.
THE STATE.

Upon an indictment for larceny, evidence is not admissible to show that the defendant has a general disposition to commit that offense; nor that he had been guilty of a similar offense; much less that he had been guilty of a felony of a different character.

Where an attempt has been made, by exciting the fears of a prisoner, to procure him to make confessions, and there is reason to presume that the attempt had that effect, evidence of his confessions is inadmissible.

Monday,
May 24.

APPEAL from the *Cass* Circuit Court.

HANNA, J.—The defendant was indicted, tried and convicted of larceny. Exceptions were taken at the trial to the admission of evidence upon two points; first, upon the question of character, and, second, upon the reception of confessions.

Before the close of the evidence in behalf of the state, the defendant asked one of the witnesses for the state, "if he had ever heard of any charge against him, defendant, before the present one"—to which he answered that he never had heard him charged with any offense before the present case. This witness also gave testimony tending to prove the general good character of the defendant, as well as evidence "that he had trusted him with his team, money," &c. This evidence, other than of general character, was not objected to.

The state then called another witness and asked him to state what he knew "of the defendant having been charged with feloniously passing counterfeit money." The evidence was objected to, but the Court permitted the witness to testify that he heard that the defendant was arrested for passing counterfeit money in *Lafayette*.

The examination, referred to as a cross-examination, having been really an examination in chief, by the defendant, upon the question of character, might have been objected to at the time it was made, the whole of it for being out of place at that time, and a part of it for its impropriety. Not having been objected to, the state had a right to cross-examine upon the general question, and also as to the grounds of the witness's belief, and as to particular facts,

and might bring evidence in contradiction, to impeach the general character of the defendant. 2 Stark. Ev. 366.—3 Greenl. Ev. §§ 25, 26.—Burrill on Circumst. Ev. 533.—Whart. Amer. Crim. Law, 294.

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1858.

SMITH
V.
THE STATE.

But it is not allowable to show, in a case similar to the one at bar, that the defendant has a general disposition to commit the same kind of offense (15 New Hamp. R. 169.—Whart. *supra*, 295); nor that he had been guilty of a similar offense (*Id.* 295.—*McIntire v. The State*, decided at the last term of this Court (1).—*Walker v. Com.*, 1 Leigh, 574); much less that he had been guilty of a distinct felony of a different character. Nor was the foundation laid for the introduction of such evidence, by the prosecutor standing by and without objection permitting improper questions to be asked, and irrelevant answers elicited. Even the record of the charge in *Lafayette* would not have been competent evidence on the trial in this case, nor the evidence of one who saw him arrested upon it, much less that of one who testified to what he had heard in regard to such arrest.

The state offered to prove the confessions of the defendant, and thereupon the witness, *Sutherland*, was questioned as to the circumstances under which such confessions were made, and stated that, “soon after he was arrested I told him that I knew him and his people, and that if he would confess to me all he knew about the matter, referring to the mare, I would assist him in getting clear; but if he would not so confess, I would pursue him to the extent of the law, and put him through.” Again, the witness said, “we were with him as much as a half an hour, with a view of working upon his fears by such threats as above stated, and also working upon his hopes, as above stated, in order to influence him to make a confession concerning the taking of the mare. I told him I asked no boot of him—that I could put him through.” Again, “the prisoner seemed much affected, and shed tears.”

Another witness was introduced, who accompanied *Sutherland* in attempting to obtain a confession, and who corroborated his evidence as to the statements that were made

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 V.
 THE STATE.

to the defendant by *Sutherland*, and also, that witness "said to the prisoner that *Sutherland* would do what he said, and that he had better confess. * * * We did all we could to get him to confess, so that *Sutherland* could get his mare."

Evidence was received of confessions thus elicited.

In the absence of a statute upon the subject, the rules of evidence would not have permitted admissions, or confessions, thus obtained by the prosecuting witness, to be given in evidence. 2 Stark. Ev. 39.—Whart. Am. Crim. Law, 316.—1 Greenl. Ev. §§ 219 to 222.

Our statute upon the subject is as follows:

"The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear produced by threats," &c. 2 R. S. p. 373.

It would be almost impossible to determine whether a person was laboring under the influence of fear, so far as to compel or induce him to confess, from the use of the means detailed in evidence in this case, for the reason given by *Greenleaf*, vol. 1, p. 287. He says: "Language addressed by others, and sufficient to overcome the mind of one, may have no effect upon that of another." One thing appears to be certain: the attempt was made by the prosecuting witness to excite the fears of the prisoner, and there is some reason to believe it had that effect, from his shedding tears; and it is equally certain that such attempts ought not to be countenanced in behalf of the state against a prisoner. The evidence ought not to have been received.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

H. P. Biddle and *B. W. Peters*, for the appellant.

(1) *Ante*, 26.

CUMMINGS v. HENRY.

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1858.

10	100
125	351

CUMMINGS
v.
HENRY.

A party may rescind a contract entered into when he was so far intoxicated as to render him incompetent to contract, within a reasonable time.

Whether the party was so intoxicated, is a question for the jury.

A contract of sale of property intended to be used for gaming, is not void under our statutes.

APPEAL from the *Cass* Court of Common Pleas.

Monday,
May 24.

HANNA, J.—This was an action by *Cummings*, on a note and account, against *Henry*.

Several answers were filed, upon which issues of fact were formed. Trial and judgment for defendant.

The questions in this Court, arise upon the instructions given and refused to the jury.

The note was given by defendant to the plaintiff for a part of the consideration money for a mare purchased by the defendant of the plaintiff. The account was upon the same consideration.

By the pleadings and evidence two questions are made: first, whether the defendant was capable of contracting at the time he made the purchase, and, secondly, whether the contract is void for illegality, and as being against public policy.

There was evidence tending to prove that at the time the defendant made the contract he was intoxicated, and that he purchased the mare to run for a wager in what is commonly called a horse-race, of which the plaintiff was cognizant; and that the defendant offered to return the animal, and demanded a rescission of the contract.

The first instruction objected to is as follows: "If *Henry* was so intoxicated as to render him incompetent to contract, he had a right to rescind the contract at any reasonable time after he became sufficiently sober to know the character of the contract with *Cummings*; and if *Cummings* refused to return the note and take back the property, the contract is nevertheless void, and the recovery on the note is avoided."

Other instructions were given by the Court, which were

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to the effect that such contract was voidable, at the option of the person who was drunk.

This instruction is said to be too general; that by it, the question is left to the jury to determine the degree of drunkenness that renders a person incompetent to contract; and that such question is one of law, purely, to be determined by the Court. Therefore, the plaintiff asked an instruction, which was refused, as follows:

“A man must be so drunk as not to be able to stand, or write, or understand what he is doing, to avoid his contract on the plea of drunkenness.”

This instruction assumes that a man would be responsible for the performance of his contracts, however he might be deprived of reason by intoxication, until he became so drunk that he could not “stand or write.” Some men are so constituted as to be able to retain and command their mental powers when much intoxicated, whilst others become wild or imbecile, when laboring under, apparently, a degree of intoxication affecting much less the physical system. The simple question would be, was he competent to contract. That is a question for the jury. It is proper for the Court to present to the jury the rules of law upon the subject, and then the jury determine whether the evidence brings the case within those rules. 6 Blackf. 240.—1 Pars. on Cont. 310 and note.—2 *id.* 573 and note.—3 Blackf. 51.

The next question is made upon the following instruction:

“If *Cummings* sold the mare to *Henry* as a race nag, for the purpose of being run on wager for money or property, and *Cummings* knew that fact, the contract is void as being against public policy.”

Other instructions were given tending to the same conclusion.

The appellee insists that a contract, made under the circumstances indicated in this instruction, is void; and cites 2 Pars. on Cont. 253; *Peck v. Briggs*, 3 Denio. 107; *Jackson v. Walker*, 5 Hill, 27; *White v. Buss*, 3 Cush. 448.

In the first authority cited, the following language is used: “All contracts which provide that anything shall be done,

which is distinctly prohibited by law, or morality, or public policy, are void." May Term,
1858.

This embodies the principle upon which the several decisions to which reference is made were arrived at. The one in *Denio* was a case in which *Peck* and one *Tompkins* made a bet on the election, and they each borrowed the money bet of one *Briggs*, and deposited it with *Briggs* as a stakeholder. Upon the decision of the bet, the money was paid to the winner. Suit by *Briggs* for the money loaned; and the Court say that, by the statute of 9 Ann, c. 14, in force in *New York*, securities taken for money knowingly lent to be bet, are void; and that by the statute of *New York* the contract itself is void. So in *Ruchman v. Bryan*, the plaintiff had bet 3,000 dollars on a trotting-match, which he lost and paid. By agreement, the defendant was interested in the bet with the plaintiff to the amount of 600 dollars; and upon ascertaining the loss, by his request, the plaintiff advanced that sum for him in paying the loss; and in a suit for the 600 dollars advanced, the plaintiff was defeated—the Court referring to both the *English* and *New York* statutes in making the decision. So in *Jackson v. Walker*, the plaintiff had, in 1840, erected a structure called a log, cabin, used for holding political meetings and selling refreshments in, upon its proving a losing business, and the plaintiff expressing the intention of tearing it down, the defendant promised the plaintiff 1,000 dollars if he would not do so, but keep it open until after the election, which he thereupon did; and upon suit brought against the defendant for refusing to pay the 1,000 dollars, the Court held the contract void under the statute of *New York*, which provides, among other things, as follows: "It shall not be lawful to contribute money for any other purpose intended to promote an election of any particular person or ticket," &c. So in *White v. Buss*, which was an action for money loaned: "The same evidence by which the loan was proved, tended to show that the money was loaned whilst the plaintiff and defendant, with other persons, were gaming and playing for money at cards," &c. The Court say, "We think the tenor and effect of the

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statutes treat gaming, as characterized by the judge's charge in this case, as unlawful; and, therefore, our opinion is, that it is within the principle of the cases cited, that all contracts designed to promote, advance and uphold an unlawful purpose or practice are utterly void."

Now although these decisions appear to correspond in principle with the text of *Parsons*, yet the decisions are made to rest upon the statutory provisions of the several states in which they were delivered. Our statutes are, first, an act touching gaming contracts (1 R. S. p. 305), which renders void "all notes, bills, bonds, conveyances, contracts, &c., when the whole or any part of the consideration thereof shall be for money or other valuable thing won, on the result of any wager, or for repaying any money lent at the time of such wager, for the purpose of being wagered." Other sections following provide for recovering money which may have been lost and paid. Yet other provisions of the statute (2 R. S. p. 435) prescribe the punishment that shall be inflicted for either winning or losing, &c.; or for keeping a house in which gaming is permitted.

It is clear, from these statutes, that it was the intention of the legislature to make gaming for money, or other valuables, an unlawful act; therefore, it is said in argument, that for property sold to a person who intends and purposes using it some way in this illegal business, no recovery can be had.

Our statute makes void two classes of contracts, and all securities taken on them: first, for money, &c., won; second, for money lent at the time of such wager, for the purpose of being wagered. A contract of sale of property to be used in gaming, does not fall within the express provision of this statute; nor can it, as we conceive, be made to fall within the general meaning of our statutes, either upon the subject of gaming, or the contracts connected therewith. In the case at bar, the distinction does not appear to have been sufficiently kept up between transactions in which the sale and the illegal act are so mixed and blended as to form really but one contract, and those where the sale and the illegal act are distinct, and do not neces-

sarily, by the contract, form parts of the same transaction. No doubt a contract expressly providing that a race should be run for a wager, would be void; as if the contract of sale in this case had been made by the vendor to depend upon, or be connected with, the result of a race for a wager.

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If a mechanic were to sell guns to persons whom he knew purposed target-shooting for a wager, we cannot believe he would be remediless, by the laws in force in this state, when he should seek to recover the price of such guns.

In the case of *Armstrong v. Toler*, the following language is used by Chief Justice MARSHALL in delivering the opinion of the Supreme Court: "Questions upon illegal contracts have arisen very often, both in *England* and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law." 11 Wheat. 272.—6 Curtis, 591.

The consideration of this contract was not a wager, nor that a race should be run for a wager, but it was the delivery of the animal which perhaps might be used for that purpose. The consideration of the note is not therefore wicked in itself, nor is the sale of a horse prohibited by law.

Per Curiam.—The judgment is reversed with costs.

L. Chamberlin, for the appellant (1).

H. P. Biddle and *B. W. Peters*, for the appellee (2).

(1) Mr. *Chamberlin* cited authorities to the following points:

1. It is no defense to an obligation that it was given for property which the vendee intended to apply to an unlawful purpose, even though the vendor, at the time of the sale, knew that the property was thus to be used. *Holman v. Johnson*, Cowp. 341.—Story on Cont. § 624.—Hilliard on Sales, 305, 306.

2. The instructions refused should have been given. Story on Cont. § 45.—3 Blackf. 51.—6 *id.* 240.

(2) Counsel for the appellee made the following points:

1. Money lent to be used in gaming cannot be recovered back. *White v. Buss*, 3 Cush. 448.

2. No action will lie on a contract made in violation of a statute, or of public policy, or against good morals. *Wheeler v. Russell*, 17 Mass. R. 258.—*Warren v. The Insurance Co.*, 13 Pick. 518.—*White v. Franklin Bank*, 22 *id.* 181.—*Roquet v. Ball*, 4 Ohio R. 400.—*Jackson v. Walker*, 5 Hill (N. Y.), 27.

3. A party who makes a contract in such a state of drunkenness as not to know what he is doing, cannot be compelled to perform that contract by the

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other party who knew him to be in that state. A man who takes an obligation from another under such circumstances is guilty of actual fraud. Addison on Contracts, 872.

The Court will vigilantly look into contracts made under mental imbecility, especially when coupled with inadequate consideration. *Cruise v. Christopher*, 5 Dana, 181.—*Tracy v. Sackett*, 1 McCook, Ohio R.—1 Pars. on Cont. 310.

MILLS and Others v. THE STATE on the relation of BARBOUR and Others.

A justice of the peace is not a state or county officer, within the meaning of § 11 of the act organizing the Court of Common Pleas.

The Court of Common Pleas has jurisdiction of a suit upon the official bond of a justice of the peace.

A summons cannot, under the code, be issued upon a *præcipe*; nor can it issue before the complaint is filed.

Where a summons has been issued upon a *præcipe*, the error might be waived by appearance without a motion to quash or set aside the summons; but appearance after judgment by default, and making an ineffectual motion to set aside the default, will not operate as a waiver of the error.

Monday,
May 24.

APPEAL from the *Howard* Court of Common Pleas.

WORDEN, J.—This was an action brought by the appellee against the appellants, in the Common Pleas of *Howard* county, on an official bond of the appellant, *Mills*, as a justice of the peace.

It appears by the record that, on the 14th of *May*, 1855, the relators filed in the office of the clerk of said Court a *præcipe*, requiring the clerk to issue a summons in the cause; and that on the same day a summons was issued, which was afterwards served and returned. Afterwards, on the 1st day of *June*, in the same year, a complaint was filed. At the next term of the Court, held in *July*, when the summons was made returnable, the defendants below were called and defaulted, and judgment rendered against them as by default. They afterwards moved to set aside the default; but their motion was overruled. There is a question raised as to an amendment permitted by the Court after the judgment by default had been entered; but from

the view we take of another point in the case, it will be unnecessary to notice it.

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Several errors are assigned; but we shall notice but two of them. The first is, "that the Court had no jurisdiction to try and determine the cause;" and the second, "that the writ issued without the authority of law, and was void."

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It is claimed that the Court had not jurisdiction of the subject-matter of the action; and this depends upon the construction which shall be given to the 11th section of the act organizing the Court of Common Pleas, and defining its jurisdiction, &c. 2 R. S. p. 18. That section provides that, "In all civil cases except for slander, libel, breach of marriage contract, action on official bond of any state or county officer, &c., the Court of Common Pleas shall have concurrent jurisdiction with the Circuit Court," &c. Is a justice of the peace a "state or county officer" within the meaning of said section?

There are several constitutional and statutory provisions that seem to bear upon this question. By the 14th section of article 7 of the constitution, it is provided that "A competent number of justices of the peace shall be elected, by the voters in each township in the several counties," &c.

Section 6 of article 6 provides that "All county, township, and town officers shall reside within their respective counties, townships, and towns; and shall keep their respective offices at such places therein, and perform such duties as may be directed by law."

By the first section of the act to provide for township elections (1 R. S. p. 269), it is enacted "That there shall be held an election in each township, at the usual place of holding elections, on the first *Monday* of *April* in each year, for the purpose of electing *township* officers, and such other officers as may be provided for by law," &c.

By the act providing for the election of justices, and defining their jurisdiction, &c. (2 R. S. p. 449), it is provided that the number of justices in each *township* shall be regulated by the board of commissioners; that vacancies shall be filled at the *township* election next preceding the time when the vacancy will occur; that their jurisdiction in civil

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cases shall, unless otherwise provided by law, be limited to *their townships* respectively; and that if they absent themselves from the township for more than thirty days they shall deposit their dockets, &c., with another justice.

From these several provisions it seems to us clear, that a justice of the peace is not a state or county officer, within the meaning of the law. He is elected by the people of a *township*, at a *township* election, under a law providing for the election of township officers. His jurisdiction is confined, ordinarily, to his township, and we think, under the constitution, he is required to reside and keep his office in the township in which he is elected, and therefore we think he is a *township* officer, as contra-distinguished from a state or county officer.

The Court below, in our opinion, had jurisdiction over the subject-matter of the action.

The other objection to the proceedings, however, we think is well taken. The summons issued upon a mere *præcipe*, as was the old practice, without any complaint being filed. The suit was commenced after the taking effect of the revision of 1852. By that code (2 R. S. p. 35, § 34), it is provided that "A civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons," &c.

We think that, under the statutory provision, the filing of a complaint is a necessary pre-requisite to the issuing of a summons, and that a summons issued before a complaint is filed, is issued without authority of law, and void.

The error might probably be waived by the appearance of the defendants to the action, without any motion to set aside or quash the summons; as, indeed, the issuing of a summons at all might be waived; but we do not think the appearance of the defendants below, after judgment by default had been entered against them, and making an unsuccessful motion to set aside the default, will operate as a waiver of the error.

Per Curiam.—The judgment is reversed at the cost of

the relators, and the cause remanded, with instructions to the Court below to dispose of the case in a manner not inconsistent with this opinion.

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N. R. Lindsay and *T. J. Harrison*, for the appellants.

H. A. Brouse and *H. P. Biddle*, for the state.

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By ch. 18, Acts of 1855, the objection that the complaint does not set forth a sufficient cause of action, may be made on appeal, though not raised in the Court below.

An injunction will lie to prevent the commission of a mere trespass only in cases where irreparable injury would result and the plaintiff has no other remedy.

APPEAL from the *Laporte* Circuit Court.

Tuesday,
May 25.

DAVISON, J.—The complaint in this case charges that *Catterlin*, who was the plaintiff, was the owner in fee of an eighty-acre tract of land lying on both sides of a section line; that in the year 1835 a county road was located on said line, across the middle of the land, dividing it into two forty-acre tracts, which was opened as located, upon the line run by the government, and while the blazes were yet visible; that in the same year the plaintiff built a dwelling house, and commenced making improvements on his land—fenced the road on both sides, where it passes through the land, and has built his house, made improvements and planted ornamental trees, with a view to the road as opened and fenced; that he has resided on the land continuously for the last twenty years; and that the road has been so fenced for the last thirteen years. It is averred that the location of the road had never been changed by competent authority; but that *Bolster*, the defendant, who was the supervisor of the district in which it was located, claiming that it was not opened on the true section line, threatened

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and intended to move the road twenty feet east, and with that view had actually commenced tearing down and removing the fence, &c. The prayer is for an injunction, &c.

The defendant answered, 1. By a special denial. 2. That the road, as opened and fenced, is altogether on the west side of the section line, when it should have been upon the line—that is to say, one-half on the east side and the other half on the west side thereof. And that defendant, as supervisor, in the discharge of his duty as such, has sought to open the road upon the line, &c. 3. That plaintiff had made his improvements with reference to the road as defendant proposed to open it; that his house, garden and ornamental trees, were on the west side of the road, and that defendant was about to remove the road twenty feet east—so that such removal would not injure any of the plaintiff's improvements.

To the second and third paragraphs, demurrers were sustained. The issues made by the special denial were submitted to the Court, who found for the plaintiff, and thereupon it was adjudged that the defendant be enjoined, &c.

The evidence not being in the record, the only question to settle relates to the action of the Court in sustaining the demurrers. The appellant contends that he was entitled to a judgment, though the defenses set up may have been defective; that the demurrers to the answer authorized him to attack the complaint; and that that pleading does not state facts sufficient to constitute a cause of action. Section 50, ch. 1 of the 2 R. S. of 1852, enumerates six causes of demurrer, and declares that for no other cause shall a demurrer be sustained. But there is a subsequent enactment which says—"When any of the causes of demurrer enumerated in section *fifty* do not appear upon the face of the complaint, the objection (except for misjoinder of causes) may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except the objection to the jurisdiction of the Court over the subject of the action,

and the objection that the complaint does not state facts sufficient to constitute a cause of action." Acts of 1855, p. 60.

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The appellee concedes that, under these rules of practice, the alleged defect in the complaint is not waived, but may be reached upon demurrer to the answer. Still he contends that, in this instance, the objection is not available, because it does not appear to have been raised in the Circuit Court—that this Court can only decide those points which have been submitted to the Court below, where an exception has been formally taken and made a matter of record. This is evidently a correct exposition of a general rule of practice; but it is quite obvious that the question under consideration involves an exception to that rule. The act to which we have referred, in effect says that the defendant, though he fails to demur, does not waive an objection to the complaint, either for a defect of jurisdiction, or its failure to set forth a sufficient cause of action. And it has been often decided, that such defects may be noticed at any time when the question is raised, even after judgment, on appeal. *Raynor v. Clark*, 7 Barb. 581.—*Willey v. Strickland*, 8 Ind. R. 453.—*Barnard v. Haworth*, 9 Ind. R. 103.—Van Santvoord's Pl. 652, 653. Where, upon the statements in the complaint the plaintiff is not entitled in law to a judgment in his favor, judgment should be rendered for the defendant, though a verdict has been found against him. 2 R. S. p. 121, § 372.

We are next to inquire whether the facts stated in the complaint authorize the injunction? Formerly such relief was allowed only in instances of waste, in cases where a privity of title existed between the parties; but the ancient rule has been relaxed, so that an injunction will now lie to prevent the commission of a mere trespass, where irreparable injury would be the result, and where the plaintiff would have no other adequate remedy. *Waterman's Eden on Inj.* 281.—8 Blackf. 377. In *Jerome v. Ross*, 7 Johns. Ch. 334, Ch. KENT says: "I do not know of a case in which an injunction has been granted to restrain a trespasser, merely because he was a trespasser, without show-

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ing that the property itself was of peculiar value, and could not admit of recompense, and would be destroyed by repeated acts of trespass." In the case at bar, the complaint charges that the road in question was laid out and opened in the year 1835, upon what was then believed to be the section line, and since that year has been used as a road and never has been changed by competent authority. Now if these charges be true, the defendant, in his attempt to remove the road, acted without the scope of his authority as supervisor, and was guilty of a trespass. Still, however, the inquiry arises, would irreparable injury be the result of such trespass? It is averred that the plaintiff built his house, made improvements, and planted ornamental trees, with a view to the road as opened and fenced; though it is not shown that by its removal the enjoyment or value of his farm would in any degree be impaired. There is, indeed, but one averment upon which the object of the suit can be supposed to rest, viz., "that the defendant had threatened and intended to remove the road, and with that view had actually commenced removing the fences;" and that, it seems to us, avers simply an intent to commit a naked trespass—one not irreparable, but the subject of full recompense in damages. The facts stated in the complaint do not, in our opinion, authorize an injunction. It follows that the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs.

A. L. Osborn and *D. J. Woodward*, for the appellant.

J. B. Niles, for the appellee.

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EVANSVILLE, INDIANAPOLIS AND CLEVELAND STRAIGHT
LINE RAILROAD COMPANY v. FITZPATRICK.

The opinion of a witness as to the amount of damage resulting from the construction or operation of a railroad, is not competent evidence.

The jury, in determining the amount of such damages, are to exclude from

their consideration all future benefits that may accrue to the owner of the land, from the construction or operation of the road.

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The fact that a landholder is obliged, by the construction of a railroad through his farm, to make additional fences, may be considered in estimating the damages.

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Quere, whether a railroad company can be compelled to maintain one-half of a partition fence separating its roadway from an adjoining farm.

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TRICK.

A judgment in a proceeding to assess damages for land taken by a railroad company, which requires that not only the amount assessed by the jury, but also the costs of suit shall be paid before the land shall vest in the company, is erroneous.

APPEAL from the *Pike* Circuit Court.

Tuesday,
May 25.

DAVISON, J.—This was a proceeding by the railroad company against *Fitzpatrick*, under the act entitled “An act for the incorporation of railroad companies.” The plaintiffs having located their road, filed in the clerk’s office of the Circuit Court a complaint, representing that a portion of the defendant’s lands necessary for the construction of the road through the same, viz., four and one-half acres, had been appropriated for that use, and that they would apply for the appointment of arbitrators to assess the damage that might be sustained by such appropriation. And the defendant being notified, &c., the Court, upon the plaintiff’s application, appointed three arbitrators, who returned an award allowing the defendant one cent damages. To this award, the defendant filed exceptions, which were sustained, and thereupon the Court ordered a reassessment by a jury of twelve men. The jurors, having examined the lands in question, heard the evidence adduced by the parties, and the charge of the Court, and having retired for consultation, returned a verdict for the defendant for 297 dollars. The plaintiffs moved to set aside the verdict; but the Court overruled their motion, and rendered the following judgment: “It is therefore considered, &c., that the defendant recover of the plaintiffs 297 dollars, together with the costs by him expended, &c. And that the plaintiffs, upon the payment of said judgment, do have and hold the land appropriated as described in the complaint, &c.”

During the trial, the defendant propounded to witnesses

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certain interrogatories which were answered, and which, with the answers, are as follows:

1. "By the appropriation of four and one-half acres of the defendant's land to the purposes of the railroad, how much per acre will it injure his whole farm?" Answer: "*In my opinion*, it would injure the balance of the farm (146 acres) one dollar per acre."

2. "From your examination of the defendant's land, what amount of injury does he sustain by reason of the appropriation to the use of the railroad, of the track of such road? In estimating such injuries, you may take into consideration the quantity of land taken by the plaintiffs; the expenses of fencing the cultivated land; the manner in which the road is located through his farm; and all the injuries directly resulting from such appropriation." Answer: "Five hundred dollars."

To these interrogatories and answers, the plaintiffs, at the proper time, objected, upon the ground that witnesses could only testify as to facts, and should not be allowed to estimate damages, that being the province of the jury; but their objections were overruled.

As a general rule, witnesses are only permitted to state facts, such as are within their own personal knowledge. Opinions, beliefs and deductions, must be confined to the tribunal whose duty it is to decide upon questions of fact. There are, however, exceptions to this rule; but none of them relates to the point involved in the ruling of the Circuit Court. For instance, on questions of science, skill or trade, persons of science or skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. And, in reference to property appropriated by railroad corporations, it has been decided that a witness who has personal knowledge of the property taken, and from his own experience and observation has become acquainted with its value, may give in evidence his opinion on that question. But the opinions of witnesses, as to the amount of damage done by the construction or operation of the road, are not competent evidence. They

may state the particular injuries, and the jury are to form their own conclusion of the amount, from the facts proved. Sedgw. on Dam. 588, 589.—1 Greenl. Ev. § 440.—16 Barb. 100.—Pierce on Am. Railroad Law, 200.

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In the case at bar, the interrogatories, in effect, call upon the witness to estimate the damages, and the answers plainly show a mere opinion as to the amount. The plaintiffs' objections were well taken, and should have been sustained.

Upon the close of the evidence, the plaintiffs moved the following instruction:

"In the assessment of damages, the jury should make no deductions for any benefits that may be supposed to result to the defendant from the contemplated work; but they may take into consideration any direct and actual improvement of the balance of the same tract of land by drainage, in opening the side-ditches along the grade, by which it is made more valuable; if the jury find from examination, or from the evidence, such to be the fact." This instruction was refused, and its refusal is assigned for error.

As no benefits of any kind had accrued to the defendant when the cause was submitted for trial, we are unable to perceive how any other than supposed benefits could have existed in the contemplation of the jury. No one could know whether the lands of the defendant would or would not be made more valuable by drainage, in opening the side-ditches along the grade. And though it might be supposed, or even fully believed, that the ditches would be beneficial to the owner of the land, still such benefit had not accrued, and could have existed only in supposition. The statute says that in estimating such damages, "no deduction shall be made for any benefit that may be supposed to result to the owner from the contemplated work." 2 R. S. p. 193, § 711. This evidently intends to exclude from the consideration of the jury all future benefits that may accrue to the land-owner. Hence, the instruction was properly refused.

Further, the Court charged the jury that they might "allow defendant for fencing required to enclose his fields,

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but not his open woods, from the railroad; but that they should not allow him for rebuilding his fences for an indefinite period of time, nor for building fences, unless they find that it will be necessary for him to build additional fences to those he now has, to enclose his improved farm, or fields now enclosed; and they may allow for changing the position of the fencing to the road, if such change shall be rendered necessary."

This instruction is alleged to be erroneous because it told the jury to allow the defendant for the whole of the fencing necessary to enclose his fields exposed by the track of the railroad.

Where a landholder would be obliged, in consequence of the construction of a railroad through his farm, to build an additional fence, it would, no doubt, constitute a proper subject of consideration in estimating the damages; but the instruction before us contemplates a partition fence, and presents the inquiry, whether the land-owner would be obliged to build the whole or one-half of it? The law does not specially require a railroad company to fence their road, though it may be their interest to do so. Acts of 1853, p. 113. And the general law relative to enclosures, &c., simply declares that partition fences dividing lands occupied on both sides, except when otherwise specially agreed, shall be *maintained* throughout the year by both parties. 1 R. S. p. 293, § 15. Another section of the same statute points out the mode in which land-owners may be compelled to maintain a partition fence; but in relation to building such fence, the law is entirely silent. It seems to follow that the charge is correct—especially so far as it involves the conclusion that the defendant would be obliged, at his own expense, to build the additional fences. Whether the railroad company would be compelled to maintain one-half of such fence after it is built, is a question not before us.

An objection is raised to the form and effect of the judgment. As we have seen, it requires not only the amount assessed by the jury, but also the costs of suit, to be paid before the land appropriated shall vest in the plaintiffs. The act upon which this suit is based, provides that the

damages assessed shall be paid or tendered to the defendant, and that the corporation, upon making such payment or tender, shall hold the interest in the land, &c., and that the cost of the proceeding shall be paid by the company, &c. 1 R. S. p. 414, § 15. We are of opinion that payment of the costs of suit is not, by law, made a condition upon which the corporation is to be entitled to the land; and that the judgment is, in point of form, erroneous.

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CARPENTER
v.
DAME.

Per Curiam.—The judgment is reversed with costs.

O. H. Smith, for the appellants.

R. A. Clements, for the appellee.

CARPENTER v. DAME and Others.

Each deposition in a cause is an independent paper, and the suppression of one is not necessarily dependent upon the suppression of another.

The party taking a deposition cannot himself object to it on the ground of want of notice to the other party.

But where, of several depositions taken by a defendant at the same time and place, and upon the same notice, all but one were suppressed on the motion of the plaintiff—*held*, that the suppression furnished ground for a motion to continue.

Whether, in such case, the defendant should be permitted to withdraw his remaining deposition, lies in the discretion of the Court, or may be determined by its rules.

And it seems that the plaintiff may, in the discretion of the Court, read the deposition in evidence before the defendant has offered any evidence, if no objection be made except as to the time of reading it.

Suit to compel the specific performance of a bond for the conveyance of land, brought by the heirs of the obligee. The bond had been destroyed, and a new one executed in its place to the widow and heirs. The widow had released her interest. It was alleged that the obligor had fraudulently procured the destruction of the original bond, and substituted the new one, different in its terms. *Held*, that the widow was admissible as a witness to prove the contents, execution, delivery and destruction of the lost bond.

Under the statute of 1852, a freeholder is not a competent juror unless he be also a householder.

Quære: Does the word *householder* as used in that statute mean a holder in fee or a leaseholder of a house? or does it mean a housekeeper, or the head of a family occupying a house?

The question of mental capacity goes to the competency of a witness, and is

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for the Court; but, *quære*, whether, if the Court should hold the witness competent, and he should testify, the opposite party might be permitted to prove actual incompetency, or a weakness in a given faculty, or in all the faculties, to affect his credibility, though such proof might not be sufficient to exclude the witness.

The officer taking a deposition cannot decide legal questions. The objection to the mental capacity of a deponent must be made in the Court to which the deposition is forwarded; and if the Court should hold the witness competent, and the deposition admissible, *quære*, whether the question may be opened again before the jury.

In this case, the appellees had taken the deposition of the witness, and it was read in evidence at a previous, indecisive trial. It was again used in the trial resulting in the judgment appealed from. No objection was raised to it. Between the two trials, the appellant took his deposition, and still claimed it to be a part of his evidence. The witnesses lived in *Ohio*, where evidence to sustain his mental capacity, if impeached, would have to be sought, and it could not be produced upon the trial in progress. *Held*, that the Court wisely exercised its discretion in refusing to permit the mental capacity of the witness to be impeached.

As a general rule, there are no degrees of secondary evidence. *Coman et al. v. The State*, 4 Blackf. 241, overruled as to this point.

Tuesday,
May 25.

APPEAL from the *Tippecanoe* Circuit Court.

PERRINS, J.—Suit to compel the specific performance of a bond for the conveyance of real estate. The bond is alleged to have been given by *John Carpenter* to *Benjamin O. Carpenter*. The suit is by the heirs of *Benjamin*, deceased, against *John*. The bond upon which it is instituted had been destroyed, and a new one executed in place of it, to the widow and heirs of *Benjamin O. Carpenter*. It is alleged that *John Carpenter*, the obligee, fraudulently procured the destruction of the original bond, and substituted for it one differing in its terms. The widow of *Benjamin* released all her interest in the lands named in the bond to her children, the heirs.

Answer and replication filed. Trial by jury, who returned a verdict as follows:

“We, the jury, find for the plaintiffs, and assess their damages at 500 dollars; and we further find that the plaintiffs, who are heirs at law of *Benjamin O. Carpenter*, deceased, are entitled to a conveyance of the undivided one-third of the lands described in the complaint as lying in *Tippecanoe* county, *Indiana*.”

The appellant filed a motion for a new trial, assigning

the usual causes, which the Court overruled, and rendered judgment in accordance with the verdict. May Term,
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As there is some evidence tending to support the verdict, this Court must accept it as conclusive of the merits, if the Court below committed no error in its rulings during the course of its proceedings resulting in that verdict. *Gatling v. Newell*, 9 Ind. R. 572. CARPENTER
v.
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Among the depositions filed in the cause by the appellant, was that of *Matthew Gilfillan*. It was one of a number of depositions, taken by him at the same time and place, and upon the same notice.

The appellees moved to suppress all of the depositions thus taken, except that of *Gilfillan*, for want of sufficient notice, and the Court sustained the motion. The appellant then moved to suppress that of *Gilfi* reason, and the Court overruled the motion.

Each deposition was an independent proposition. One might be legal, another not; and the one would not necessarily be dependent upon the admission of another. And as the deposition taken by the appellant, the want of notice to the party could be no ground of objection on the part of who took the deposition. The suppression of his other depositions, on the motion of the appellees, might have furnished him ground for a motion to continue.

After the motion to suppress was overruled, the appellant asked leave to withdraw the deposition, but leave was refused. This was a matter in the discretion of the Court—a rule of Court might regulate the practice on this point. It may have done so in this case, for aught that appears of record.

The Court then permitted the appellees to give the deposition in evidence. The giving in evidence does not seem to be objected to, but the time at which it was permitted to be done. Counsel say:

“The second error complained of is: The Court permitted the appellees to read the deposition of *Gilfillan*, taken by the appellant, in evidence before the appellant had given any evidence in his defense.

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"Even if the Court ruled correctly in refusing to quash this deposition, that ruling did not make the deposition part of the appellees' evidence, and the Court should have given to the appellant the privilege of marshaling his evidence in his own way, provided in so doing he violated no rule of practice."

There is not enough appearing of record to enable us to say that the Court abused its discretion on the question of time of reading the depositions.

The record states that the plaintiffs (the appellees), on the trial of the cause, "produced *Matilda Carpenter* as a witness in their behalf, who testified that she was the widow of *Benjamin O. Carpenter*, deceased, and the mother of the plaintiffs; and thereupon the plaintiffs offered to prove by her the contents of the lost bond on which the suit was founded, and which bond plaintiffs alleged was given by the defendant, to said *Benjamin O. Carpenter*, during the coverture of said *Matilda*; and also to prove the execution and delivery of said bond, and its destruction; to the making of which proof by said witness the defendant objected, but the Court overruled the objection, and permitted her to testify," &c. As Mrs. *Matilda Carpenter* had released all her interest in the land sued for, she was not a necessary party to the suit. *Shaw et al. v. Hoadley*, 3 Blackf. 165. Her deceased husband was not, either actually, or within the spirit and meaning of the statute, a party. *Riser et al. v. Snoddy*, 7 Ind. R. 442. She could not be excluded, then, as a witness, on account of being a party; for she was not such, and the judgment rendered would in no manner accrue to her benefit. She could not be excluded from interest; for even if it existed, it did not disqualify. *Jack v. Russey*, 8 Ind. R. 180. She was not called to testify for or against her husband; for he was not a party to the suit. Her exclusion, therefore, could not be placed upon this ground. Could it be put upon the ground that she was offered for the purpose of disclosing communications between her and her husband, made during coverture? Without here attempting to define with precision what are to be considered, in all cases, such communica-

tions, we will say that we do not think the definition should be broad enough, when given, to embrace the testimony of Mrs. *Carpenter* in this case. This is very like the case of *Jack v. Russey, supra*, by which we think the ruling below, now under consideration, is justified.

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The Court sustained a challenge to a juror. The record states that "*Charles Stockton*, a talesman, was called as a juror; that during his preliminary examination under oath, as to competency, he was asked whether he was a householder, to which question he answered that he was a married man, and owned a farm in the county; that he rented his farm and house on it, but by an arrangement since the lease, with his tenant, he holds a part of his house, and claims possession of it, has his household goods in it, considers it his home, keeps a post-office in the house which he tends to himself, or by deputy; that he is not there more than one-eighth of his time, and since the renting of his house, his wife has been visiting among friends in the county. Upon these facts the Court sustained a challenge to said *Stockton*, as a competent juror, for cause. The ruling was excepted to.

The correctness of the ruling depends upon the scope to be assigned to the word, *householder*. Did the legislature intend, by using that term, to render incompetent a freeholder who was not also a householder? Or did they use it merely to express a less degree of property, meaning thereby to diminish the qualification required. Did they mean to concede that a freeholder would be competent, of course, and, by the use of the word householder, to extend the qualification to those possessed of a leasehold interest?

We think this is not the interpretation. The language will not justify it. A man may be a large owner of lots and lands—a freeholder, but there may be no house upon the freehold. And had the legislature intended to have rendered competent both freeholders and householders, it is reasonable to suppose they would have said so. They did say so in the code of 1843. See p. 951, § 2. But in the code of 1852, the word *freeholder* is dropped, and the qual-

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The next inquiry is, in what sense, as to qualifications, is the word *householder* used in the statute? Does it mean simply that he must be a holder in fee, or a leaseholder of a house, or does it mean that he must be a housekeeper—the head of a family occupying a house? The word, in statutes, seems generally to be used in this latter sense. See a collection of *English* cases on the word *housekeeper*, in 3 Petersdorff, pp. 103 to 106. It is so used in our statute exempting property from execution. *Wharton*, in his Law Dictionary, defines a householder, to be the master of a family. It would seem that the legislature held that a man was not qualified to discharge the duties of a juror till he had had the experiences, and felt the sympathies and responsibilities of the head of a family; nor unless he continued to live with his family. If such be the construction of the statute, it is certainly very doubtful whether *Stockton*, in this case, had the qualifications of a juror; but we need not decide the point here, for the record does not show that any intended unfairness was practiced in the selection of the jury, nor but that a perfectly impartial and satisfactory one was obtained to try the cause. *The People v. Ransom*, 7 Wend. 417.—*The King v. Hunt*, 4 B. and A. 430.

The appellant offered to prove to the jury, that *Matthew Gilfillan* was not of sound memory; but the Court refused permission. In this, it is claimed by the appellant that the Court erred; while the appellees contend that it was not a question to be tried by the jury, but by the Court, before the evidence of the witness was submitted to the jury.

Matter that goes to the competency of a witness, is for the Court, that which goes to his credibility, for the jury. Most matters which formerly went to the competency, now, by statute, in this state, go to the credibility of witnesses. It may be proved that a witness is interested, has been convicted of a crime, is not of good moral character, does not believe in the existence of a Supreme God, or in the chris-

tian religion. And, finally, section 243, 2 R. S. p. 83, enacts that "any fact which might heretofore be shown to render a witness incompetent, may be hereafter shown to affect his credibility." May Term, 1858.
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The want of mental capacity, however, by the statute, goes to the competency of a witness (2 R. S. p. 81); and where he was introduced in Court to be sworn to testify, the Court, on the objection being raised, would satisfy itself, by an examination of the proposed witness, or by hearing evidence, of the validity of the objection, before it permitted the witness to testify. Whether, if the Court should hold the witness competent, and he should testify, the opposite party might be permitted to prove actual incompetency, or a weakness in a given faculty, or in all the faculties, to affect the credibility of, though it did not exist in a sufficient degree to exclude, the witness, we do not decide, though such would seem to be inferable from the above quoted statute. In cases of written instruments offered in evidence, but objected to as invalid in their execution, &c., the Court first decides upon the objection, but it is again open to the jury. See note to 1 Greenl. Ev. p. 714.

But in this case the witness was not introduced in Court—the Court had no opportunity to test the capacity of the witness; and the officer who took his deposition had no right to decide upon legal questions, if raised at the taking. He was not a Court. It was his duty to take down all the testimony of the witnesses produced, and forward it to the Court in which it was designed to be used. In that Court, all objections would be raised, heard, and decided. The objection in this case, might, at the proper time, and by the proper party, have been made to the Court, in the first instance; and if the Court had held the deponent competent, and his deposition admissible, we do not say the question might not have been opened again before the jury. We do not feel called upon to decide the point here, for we think, in this case, there are other considerations which will sustain the ruling of the Court below.

It appears that the appellees had taken *Gilfillan's* deposition which had been read in evidence at a previous, inde-

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cisive trial; that it remained on file to be, and was, again used on the trial resulting in the judgment appealed from, and that no objection had been raised to it. Between the two trials the appellant took *Gilfillan's* deposition, and still claimed it to be a part of his evidence. The witness lived in *Ohio*, where evidence would have to be sought to sustain his mental capacity, if impeached, and could not, of course, be produced at the trial then in progress. Under these circumstances, we think the Court wisely exercised its discretion in refusing to permit the attempted impeachment.

The Court refused to give the following instruction:

"That a written copy of a bond made fifteen years ago, sworn to by the person who wrote and witnessed it, is better evidence of the contents of the original, than verbal evidence given from memory only, if the witnesses are equally credible."

Whether the Court refused this instruction because it did not consider it strictly applicable to the evidence; or did not consider it to be law; or considered that, if law, the appellant, having himself destroyed the original bond, had not a right to the benefit of the rule,—we are not advised. But it seems that the better opinion now is, that there are no degrees, as a general rule, in secondary evidence. 1 Greenl. Ev. p. 738. See 1 Greenl. Ev. p. 159, note; 3 Wend. Black. Com. p. 368, note 28; *Doe v. Ross*, 7 M. & W. 102, and note on p. 108. The case of *Coman et al. v. The State*, 4 Blackf. 241, cannot be applied as law to the case now before the Court. A difference may be created by statute.

The Court did not instruct the jury that interest must be considered in weighing the testimony of a witness, but doubtless would, if such an instruction had been asked. See *Spivey v. The State*, 8 Ind. R. 405.

We are unable to discover any error in the ruling of the Court below, sufficient to justify a reversal of the judgment.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

J. M. La Rue, W. C. Wilson and J. Pettit, for the appellant (1). May Term,
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Z. Baird, R. C. Gregory and R. Jones, for the appellees (2). CARPENTER
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(1) Counsel for the appellants cited authorities to the following points:

1. We do not think it competent for a party to select out of a batch of depositions taken at the same time, and certified together, that one which he conceives makes in his favor, and quash the others for want of notice, especially when the party has done no act indorsing the deposition, or recognizing the taking by the opposite party. We also contend that the deposition was under the control of the defendant, and he had the right to withdraw it from the files. *Polleys v. Ocean Ins. Co.*, 2 Shep. 141. The Court, in that case, decided that a party may withdraw his deposition at any time, but that by rules 21 and 43 of the Supreme Court of *Maine*, this privilege is restricted to the first term after the deposition is filed. The general principle then, in absence of the rule, would be that a party controls his own depositions.

2. *Mrs. Carpenter* could not have been a witness had her husband been living; and she cannot testify after his death in favor of those who occupy the position which he might have occupied had he been living. In *Cook v. Grange*, 18 Ohio R. 526, this question is canvassed and settled upon proper principles. The Court say, p. 531, "Shall it [the incompetency] be confined to such communications as have been made in confidence? or shall it embrace all transactions which occurred during the marriage in which either party may be affected, either pecuniarily or in reputation: in other words, all transactions which, at the time they happened, the witness would have been incompetent to prove? The latter, we think, is the true rule, and therefore adopted. See, also, *Stark. Ev.* pt. 4, tit. Husband and Wife, Competency.

3. A party may show the imbecility of a witness whose deposition is read by the opposite party. 1 *Stark. Ev.* pt. 3, § 57, tit. Ability of Witnesses.

4. In *Coman v. The State*, 4 Blackf. 241, it is decided that "the rule of law—that the best evidence which the nature of the case will admit of must be adduced—applies as well to secondary as to primary evidence. When an original writing is lost, or is in the possession of the adverse party, its contents may be proved, first, by a counterpart, if one exist; secondly, by a copy, if there be no counterpart; and thirdly, by parol testimony, if there be neither counterpart nor copy." See, also, 1 *Stark. Ev.* pt. 2, § 149.

(2) Counsel for the appellees cited authorities to the following points:

1. The law furnishes a valuable guide in the determination of this case, in that strong presumption in which it indulges against the spoliator of a written contract, or record evidence of any character. *Omnia præsumentur contra spoliatorum*. "The spoliation of papers is an aggravated and inflamed circumstance of suspicion. The fact may exclude further proof, and be sufficient to infer guilt; but it does not, in *England*, as it does by the maritime law of other countries, create an absolute presumption *juris et de jure*; and yet, a case that escapes with such a brand upon it, is saved so as by fire. * * * If explanation be not prompt, or be weak or futile; if the cause labors under heavy suspicions, or there be a vehement presumption of bad faith, it is good cause for the denial of further proof; and the condemnation ensues from defects in

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the evidence which the party is not permitted to supply." 1 Kent's Com. 157.—1 Greenl. Ev. § 37.—3 Cowen & Hill's Notes to Phillip's Ev. note 285, p. 456. This principle is not peculiar to maritime law—it is as fully recognized by Courts of common law, as those of admiralty jurisdiction. The cases illustrative of the application of this principle are collected by Mr. Broom in his Essay on Legal Maxims, at page 725—title, the maxim above cited. Around the above-cited, cluster other maxims of a kindred nature. *Nemo ex suo delicto meliorem conditionem suam facere potest.* *Nullus commodum capere potest de injuria sua propria.* If the appellant succeeds in his defense, there is great danger that he will have gained an advantage by his own wrong. See; also, *The Life and Fire Ins. Co. v. The Mech. Fire Ins. Co.*, 7 Wend. 31, and Wills on Presumptive Evidence, p. 72.

2. We submit that the verdict is clearly sustained by the evidence, and ought not to be disturbed, though the Court may have committed errors in the progress of the trial (*Bischof v. Coffelt*, 6 Ind. R. 23); especially as there have already been two trials of the cause. *Cunningham v. Magoun*, 18 Pick. 13.—*Baker v. Briggs*, 8 Pick. 122.

3. In all cases where the husband is a party, and his pecuniary interest is directly involved, the rule excluding the testimony of the wife is absolute. No other relation excludes. The rule is founded partly on their identity of interest, and partly on public policy, "which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice." 1 Phil. Ev., Cowen & Hill's last ed. p. 69. This rule does not extend to collateral proceedings not immediately affecting their mutual interests, notwithstanding that the evidence of the one may tend to criminate or to contradict the other, or to subject the other to a legal demand. "A wife may be a witness in an action between third persons, not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand; as in an action between third persons for goods sold and delivered, to prove that the goods had been sold, not on the credit of the defendant, but on her husband's credit." 1 Phil. Ev. 71, 73, 74 same ed.—1 Greenl. Ev. § 342. The wife after the death of her husband is competent to prove facts which did not come to her knowledge by means of her relation as a wife, notwithstanding that they relate to the transactions of her husband. 1 Greenl. Ev. § 338. The author cites, to support the text, *Coffin v. Jones*, 13 Pick. 441.—*Williams v. Baldwin*, 7 Verm. R. 506.—*Wells v. Tucker*, 3 Binn. 366.—*McGuire v. Maloney*, 1 B. Mon. 224. In the case of *McGuire v. Maloney*, the latter sued the former as administrator of the estate of *John Maloney, Sr.*, in trover, to recover the value of goods and chattels which *McGuire*, as such administrator, had sold. The widow of the deceased was held to be a competent witness in the case, to prove property in the goods in litigation in the plaintiff, under a sale from her deceased husband. In *Fitch v. Hill* and another, 11 Mass. R. 286, it is said by the Court that, "Where the husband is a party, the wife cannot be sworn either for or against him:—not for him, because their interest is one, and she may be expected to favor him; not against him, because it would be likely to create dissensions. But where the liability of the husband is contingent, and not necessarily established by the trial, in which she is called as a witness, her testimony may be received." *Beveridge v. Minter*, 1 C. & Paine 364, was an action brought by the plaintiff against the defendant to recover £150, which the defendant's testator had promised to pay the plaintiff. The widow of the tes-

tator was called by the plaintiff to prove his demand, and the Court ruled that she was a competent witness. May Term,
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4. To exclude the testimony of the wife solely on account of one of the causes above stated, it is essential that the facts which she is called to prove, should have come to her knowledge solely by virtue of that confidence which the marriage relation implies. "This rule, in its spirit and extent, is analagous to that which excludes confidential communications made by a client to his attorney."

1 Greenl. Ev. § 338. Tested by that analogy, it is clear that the knowledge which Mrs. Carpenter possessed of the facts to which she testified, was not derived in a mode which could prevent its communication in a court of justice.

1 Greenl. Ev. § 244. In the case of *McGuire v. Maloney*, above cited from B. Monroe, it is said by the Court that, "The law will not permit, even after the death of the husband, any disclosure by the wife, which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and affect injuriously the interests of society dependant upon it. But where there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be afterwards public, there is no interest of the marriage relation or of society, which, in the absence of all interest of the husband or the wife, requires the latter to be precluded from testifying between other parties to such act or declaration, not affecting the character or person of the husband."

Ratcliff v. Wales, 1 Hill, 63, was an action for criminal conversation by the defendant with the plaintiff's wife. The plaintiff after showing a divorce *a vinculo matrimonii*, called his former wife to prove the adultery. The Court ruled her a competent witness on the ground that she came to the knowledge of the fact that she was called to testify to, not by virtue of that confidence which the marriage relation, in legal contemplation, inspires, but by acting in gross violation of it.

5. Mrs. Carpenter, before the commencement of this suit, assigned all her interest under the spoliated bond to the appellees, who are heirs at law of her deceased husband. This assignment is dated the day this suit was commenced, and is made a part of the complaint. It was entirely legitimate for her to execute that assignment, and thereby restore her competency, if she were otherwise incompetent. "The competency of a witness disqualified by interest, may always be restored by a proper release. If it consists in an interest vested in himself, he may divest himself of it by a release or other proper conveyance."

1 Greenl. Ev. § 426. "It is not necessary that the release be actually delivered by the releasor. It may be deposited in Court for the use of the absent party." *Id.* 429.

6. "Mere extracts can not be used as examined copies, though the witness by whom they are proposed to be proved, is ready to swear that there was nothing in the original, relating to the matter in controversy, beyond what is contained in the extract; for to give a proper construction to the instrument the whole must be looked into; and the testimony of a person swearing that all which relates to the controversy is contained in what is produced, necessarily and at best amounts only to matter of opinion, which it is dangerous to rely upon in such cases." Cowen & Hill's Notes to Phil. Ev. note 250, p. 239. The authors cite *Dennison v. Barber*, 6 Serg. & Rawle, 420. "If a party offer a copy of a deed, or will, where he ought to produce the original, this raises a pre-

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sumption that there is something in the original deed or will which would make against him, and therefore the copy in such case is not evidence. But if he prove the original deed or will to be in the hands of the adverse party, who refuses to produce it after receiving a regular notice for that purpose—or, if he prove that the original has been lost or destroyed, without his default, no such presumption can reasonably be made, and a copy will be admitted." 1 Phil. Ev. 418, ed. above cited. The rule admitting in evidence a copy, where the original has been destroyed, has received a very important qualification, from the pen of that authoritative writer on the doctrines of evidence. In Cowen & Hill's edition of Phillips on Evidence, the editors say, "A party who, under no pretence of mistake or accident, voluntarily destroys primary evidence, for any fraudulent purpose, thereby excludes himself from the benefit of superior evidence." Note 221, p. 215 of vol. 2. The authors cite *Riggs v. Taylor*, 9 Wheat. 483. These authorities establish that a party who has voluntarily and deliberately destroyed the original, cannot use its copy as evidence of a superior character to parol testimony.

7. Our statute clearly contemplates that when a deposition has been taken and filed, the same becomes a record, under the control of the Court, in which either party to the cause, independent of the consideration under whose notice it was taken, has an equal property. This seems to be the rule in other states. *State Bank v. Western Bank*, 2 Miles (Pa.) 16.—*Walton v. Bostick*, 1 Brevard (S. Car.) 162. We cite these cases from *U. S. Digest*, vol. 4, 666, 667. The reported cases are not within our reach.

8. To constitute a householder, actual possession of the house is necessary (1 Chit. Rep. 222); and of the whole of it. *Id.* 316.

9. An irregularity in impanneling a jury will not vitiate the verdict, unless it appear that the party complaining was injured thereby. *The People v. Ransom*, 7 Wend. 417.—*The King v. Hunt*, 4 Barn. & Ald. 430.

10. Idiots and persons of insane mind are incompetent witnesses. Whether a witness produced upon the stand, or his deposition offered in evidence, is incompetent from want or deprivation of reason, is a question, exclusively, for the determination of the Court, and the evidence in relation to it is therefore addressed to that tribunal. 1 Phil. Ev. 1 to 4. After the witness has been ruled admissible, and his evidence given to the jury, his credibility may be assailed by proof that his general moral character is bad, by contradicting his statements by other witnesses, and by cross-examination, in which the widest latitude is given to the party adverse to whom he has testified, to test his capacity to testify intelligently, and the motives by which he is governed. In *England* the inquiry as to character is limited to that for veracity. The *American* rule, proceeding upon the ground that all vices are of a kindred nature, permits proof to be given of the general moral character of the witness assailed. We have failed, after diligent search, to find an elementary author, or an adjudicated case, stating the rule so broad as to permit a witness to be assailed by proof derogatory of his mind or memory. An inquiry of that character would introduce an obstacle in jury trials equally novel and embarrassing. It is competent to prove that when the events which a witness has testified to, occurred, he was in a condition that unfitted him to have accurate knowledge of them—as, for instance, that he was drunk, or had an epileptic fit. Cowen & Hill's Notes to Phil. Ev., note 387, p. 432. If such proof were admissible it could only be made by experts—persons learned in the philosophy of mind, and then

only, after the facts upon which their opinions were based, had been fully given in evidence. *Dickinson v. Barber*, 9 Mass. R. 225. This is the rule in the trial of the issue *devisavit vel non*, where the mind and memory of the testator are involved. Certainly it requires as much skill to define the degree of memory or intellect which a witness may possess, as to ascertain his entire deprivation of it.

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A note payable at a bank, is payable in the bank; and a note payable at or in a bank, is payable to the holder, or his agent, in the bank, at its counter.

The term *bank* does not necessarily refer to a chartered banking institution; though it includes all such, and is used in our constitution simply in reference to that class of banks.

Charters are not requisite for banks of deposit and discount.

The legislature, by § 6, ch. 77, 1 R. S. 378, intended to place private and chartered banks of deposit and discount upon the same footing.

APPEAL from the *Wayne* Circuit Court.

Tuesday,
May 25.

PERKINS, J.— *McAlpine*, assignee of *Cochran*, sued *Davis* upon a promissory note here copied:

“Ninety days after date I promise to pay *Samuel Cochran*, or order, 550 dollars, for value received, waiving all valuation and appraisement laws, with interest from date, payable at the *Citizens' Bank* at *Richmond, Indiana*. November 20, 1856. [Signed] *David J. Davis*. [Indorsed] *Samuel Cochran*.”

The defendant pleaded, by way of answer, a want of consideration for the note, and averred “that the *Citizens' Bank*, in the complaint named, was an unincorporated business-house in the city of *Richmond, Indiana*, receiving deposits of gold and silver and bank bills, and paying out the same; buying and selling gold and silver, bills of exchange, promissory notes, and bank-bills; discounting bills of exchange and promissory notes, and loaning money; and nothing more.”

The plaintiff demurred to the answer; the Court sustained the demurrer; and there was final judgment for the

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plaintiff for the amount of the note. The only general question which the parties raise, or seek to raise, is, whether the note sued on is governed by the law merchant.

It is enacted by § 6, 1 R. S. p. 378, that "notes payable to order or bearer, in a bank in this state, shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover as in case of such bills."

Prior to 1843, the statutory provision on this subject was, that notes payable at a chartered bank, &c., should be governed by the law merchant.

In the code of 1843 it was, that notes payable at a chartered bank, where the bank had an interest in the notes, should be governed by the law merchant, &c.

The provision in the code of 1852 differs, therefore, from all previous ones, in this, that it uses the word *in* instead of *at*, in describing the place of payment, and omits the word *chartered*, in describing the institution to be designated in the note.

Counsel for the appellant attach some stress to the substitution of the preposition *in* for *at*, insisting that it has the effect of limiting the operation of the statute to notes payable to the bank as owner; but we cannot concur in this view. We think a note payable *at* a bank is, in legal contemplation, payable *in* the bank; and that a note payable *at* or *in* a bank is, in such contemplation, payable to the holder, or his agent, *in* the bank, *at* its counter.

The only point of difficulty in the case, and the one on which it turns is, did the legislature, in using the word *bank*, in the code of 1852, mean chartered bank? Did they use the term in a general or in a limited signification? The presumption would be in favor of the use in its general signification. Ind. Digest, p. 748, § 10.—2 R. S. pp. 339, 340. And a very brief and general statement of the subject of banks and banking, as it existed prior to, and at the date of, the enactment of the code in question, will, we think, tend to strengthen rather than to overthrow that presumption.

Three kinds of banks had long been known to the commercial and business world, viz., banks of deposit, banks

of deposit and discount, and banks of deposit, discount and circulation. The three kinds seem to have originated chronologically, in the order named. The cities of ancient *Asia, Egypt, Greece* and *Rome* had banks of deposit, and later, of discount, and so had those in the mediæval period; and, at this day, there are, perhaps, upon the eastern and western continents as many and as wealthy banks of deposit and discount as there are of circulation.

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Charters are not requisite to banks of deposit and discount. Charters seem only requisite for conferring special privileges: as, to exempt the owners of the banks from personal liability for debts; to enable them to issue paper currency, &c. These charters seem to have been a comparatively modern invention, and were granted, in the first instances, by embarrassed governments to their creditors, in return for bonuses paid. The earliest instance mentioned by writers, so far as our reading has extended, of a chartered bank, is that of *Venice*, in 1157.

From this hasty review we learn very distinctly that the term *bank* does not necessarily refer to a chartered institution; though it includes all such, and is used in our own constitution simply in reference to that class of banks. A further historical fact, local to our own state, may indicate to us the reason why the legislature made the change in the phraseology of the code of 1852, by the omission of the adjective *chartered* before bank. Private banks of deposit and discount must have existed to a very limited extent, if at all, in this state, during the period of our early legislation. But in later years they have become numerous, and are discharging a large portion of the banking business. The public attention has been attracted to them, and the relative advantages and disadvantages of private and chartered banks have been largely discussed, and the public mind has been, and is, divided upon the question of their claims to public favor. Under these circumstances, we incline to the opinion that the legislature, by the code of 1852, designed to put these two classes of banks on an equal footing in the particular specified.

The answer of the defendant in this case, showed that

May Term, 1858. the *Citizens' Bank* was a bank of deposit and discount. It follows that the Court did not err in sustaining the de-

McJUNKINS murrer to it.

THE STATE. *Per Curiam*.—The judgment is affirmed, with 1 per cent. damages and costs.

J. Perry, for the appellant (1).

J. S. Newman and J. P. Siddall, for the appellee (2).

(1) Touching the meaning of the word *bank*, as used in our statutes, Mr. Perry cited 1 Bouv. Inst. 41; *Freeman v. Robinson*, 7 Ind. R. 321; *The Mayor v. Weems*, 5 id. 549.

(2) Counsel for the appellee cited *Webster's* definition of the word *bank*; and, to the same effect, 14 Johns. 205; 6 Cow. 290; 4 Wend. 498.

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Sections 96, 97 and 98, 2 R. S. p. 374, with regard to arraignment and pleading, apply alike to prosecutions by indictment and information.

On appeal, in such cases, the record must disclose an arraignment and a plea pleaded or entered upon the minutes of the Court.

A separate trial cannot be demanded as a matter of right, after the jury has been sworn, and the evidence partly heard, even if the statute gives the right, when properly claimed, to persons prosecuted by information.

Where there has been no arraignment, and the defendant has not pleaded, *quære*, what would be the effect of a motion to set aside the swearing and impanneling of the jury to enable him to plead?

In criminal prosecutions the Court must charge the jury. Upon request by either party, the charge must be in writing. But such request should be made, or written instructions prepared by counsel presented, in time to enable the Court to give them due consideration. Where the request was not made till the Court was proceeding to give an oral charge,—*held*, that it was too late.

Under the statute against "notorious lewdness or other public indecency," a prosecution will not lie for using obscene language, or singing obscene songs. The legislature will be presumed to have acted with regard to the settled judicial interpretation of words, where a different rule has not been established by that body.

Tuesday,
May 25.

APPEAL from the *Fountain* Court of Common Pleas.
HANNA, J.—This was a prosecution against six persons for the "offense of public indecency, by then and there, in

the presence and hearing of *Thomas J. McPherin* and his family, singing indecent and vulgar songs, and using vulgar and indecent language." And there is also a charge, that at the same time and place, the same improper conduct was had in presence of *James Wilson* and his family; and that said defendants were "guilty of immodest conduct and public indecency." No motion was made to quash. The record does not show an arraignment, nor any plea. A jury was impaneled, the defendants all placed upon trial, a verdict of guilty found as to all, and different punishment as to each defendant. Motions for a new trial, and in arrest of judgment overruled. Judgment on the verdict. Several errors are assigned which will be noticed in their order.

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1. Defendants were put upon trial without having been arraigned, and without a plea pleaded or entered upon the record.

Section 96, 2 R. S. p. 374, says, "The defendant is arraigned by reading to him the indictment, and requiring him to plead thereto. The Court may, for cause shown, grant a reasonable time to answer the indictment." The general issue may be pleaded orally, "which shall be entered on the minutes of the Court," and all matters of defense proved under it; and if the defendant refuse to plead "to an indictment or information, a plea of not guilty must be entered by the Court." Such is our statute; and the three sections 96, 97 and 98 are so intimately blended and connected together, when we consider them with reference to the subject of which they are treating, to-wit, trials of both felonies and misdemeanors, that we can come to no other conclusion than that they apply alike to prosecutions by indictment and information. In the case of *Dart v. Lowe*, 5 Ind. R. 131, the record stated that the issues were joined, but it contained no pleas; and notwithstanding that statement, the Court decided that the presumption was that no plea was filed. In this case, the record states that the jury "was sworn to well and truly try the issue joined." We need not stop to inquire whether that was the proper form

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of oath, nor whether the presumption ought to be indulged that the defendants had pleaded; for the record shows affirmatively that they had not been arraigned, nor had a plea been pleaded or entered.

It is unnecessary to look to the question of what was the form of a complete arraignment under the former practice. The first sentence of this statute declares the acts necessary to an arraignment now. The indictment must be read to the defendant, and he is thereupon required to plead thereto. The use of the word "required" shows this to be a duty of the Court. This view is strengthened by the next sentence, which prescribes the rule as to granting a reasonable time to answer. How could it be ascertained that time was asked, unless an answer was required? The record should disclose an arraignment and a plea pleaded or entered on the minutes of the Court.

2. The next error assigned is, in not permitting separate trials.

After the jury had been sworn and a portion of the evidence heard, defendant *James McJunkins* moved the Court to allow him a separate trial, on the ground that no arraignment had taken place, nor had he pleaded, and that he was surprised by the evidence. After the jury had been sworn, and the evidence partly heard, it was too late to demand, as a matter of right, to be tried separately; even if the statute gives that right when properly claimed, to persons prosecuted by information. The defendant should, if he was entitled to it, have availed himself of the privilege at an earlier stage of the proceedings. If a separate trial could be claimed, as a matter of right, after part of the evidence was heard, why not after all had been produced? The right to claim a separate trial at any stage of the proceedings, would, in our Courts, where the terms are of limited duration, tend to defeat the ends of justice.

We do not decide what would have been the effect of a motion by either of the defendants, upon a proper case made, to set aside the impanneling and swearing the jury, to enable him to plead.

3. The Court erred in giving an oral charge to the jury, when all instructions were required by the defendant to be in writing.

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The statute is as follows: "The Court must then charge the jury." This language occurs under the order of proceeding with, or conducting, trials in criminal cases, and is the fifth and last division of the statute upon that subject. It appears to be imperative upon the Court to charge the jury (*Little v. Smiley*, 9 Ind. R. 116); but what that charge shall contain, and how it shall be embodied and delivered, is not there provided for. See § 103, 2 R. S. p. 374. The same statute (§ 113) provides that "The judge must charge the jury in writing, when either party requests it, and the charge shall be filed among the papers of the cause." This sentence, when considered alone, would appear to indicate that it is not the duty of the Court to charge the jury, unless requested by one of the parties. This is certainly a correct position in regard to requiring the charge to be reduced to writing, but not in relation to the duty of the Court to charge the jury generally. It is obligatory on the Court, when requested at the proper time, to give none but written charges to the jury. 5 Ind. R. 375. But as it is the practice in most of our Courts for the party asking a charge, upon one or more questions, to prepare such, and present the same to the Court, accompanied with the request that all charges shall be in writing (if it is so required), we cannot conceive that it was the intention of the law-makers that such should be given, or refused, and no more. 5 Ind. R. 453. Indeed, the next sentence in the same section, in connection with the fifth provision as to trials, we think, settles this. It runs thus: "In charging the jury, he must state to them all matters of law which are necessary for their information in giving their verdict."

If the case was long and complicated, and the business in Court pressing, it would assuredly be a great hardship upon the presiding judge to require him, at a moment's notice during the confusion of a trial, to prepare in writing, such instructions as would do justice to himself and the parties. If it is said he might adjourn the Court to give

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time to prepare such charges, this would, in such case, be detrimental to the interest of other parties litigant. The better rule would appear to be, to require such instructions to be presented, or request made, in time to receive due consideration by the judge. Such is the law as to instructions prepared by a party. 2 R. S. p. 110.—9 Ind. R. 420. It is usual for each Court to adopt rules of practice upon this subject. We are not informed whether any such had been adopted by the *Fountain* Court of Common Pleas. In this case, the request was not made until the Court was proceeding to give an oral charge to the jury, and was, therefore, not made in time.

4. The next error assigned is, in overruling the motion in arrest.

Several reasons are urged in arrest of judgment in this case, the first of which is, that the information does not charge a public offense; and it is argued that singing vulgar and indecent songs, to the annoyance of a man and his family, may, in some instances, amount to a private nuisance, and furnish ground for a private action, but cannot be the ground of a public prosecution. Our statute is as follows: "Every person who shall be guilty of notorious lewdness, or other public indecency, upon conviction," &c. No offenses except such as are defined and forbidden by statute are punishable. 8 Ind. R. 494. The word *indecent* is defined by *Webster* to mean "That which is unbecoming in language or manners; any action or behavior which is deemed a violation of modesty, or an offense to delicacy, as rude or wanton actions, obscene language; and whatever tends to excite a blush in a spectator." By *Bouvier*, in his Law Dictionary, it is said to be "An act against good behaviour and a just delicacy." Examples are given by the author, such as exposure of the naked person in public, or an exhibition of bawdy pictures, &c. In *Jacobs's Law Dictionary*, "grossly scandalous and public indecency" is classed under the term lewdness, and instances are referred to, such as the examples given in *Bouvier*. In *Chitty's Crim. Law*, vol. 2, p. 42, divers forms of indictments are given for exposing the naked person publicly;

for publishing, selling, or keeping for exhibition, obscene books, prints, or pictures; but no form of an indictment is given for using obscene language. In Blackstone's Commentaries, 4th book, p. 65, in the chapter which treats of offenses against *God* and religion, the eleventh offense is termed "lewdness," and under this term is classed "grossly scandalous and public indecency," such as exposing a party's person, and also, publicly selling and buying a wife, &c.

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It would therefore appear that the term *public indecency* has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense. And hence, the Courts, by a kind of judicial legislation, in *England* and the *United States*, have usually limited the operation of the term to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster—acts which have a direct bearing on public morals, and affect the body of society.

Thus, it will be perceived that so far as there is a legal meaning attached to the term, it is different from, and more limited than, the commonly accepted meaning given by *Webster* to the word indecency. The legislature will be presumed to have acted with reference to such judicial construction, unless a different rule has been prescribed by that body. 5 Blackf. 384.—7 Ind. R. 94. The law upon the construction of statutes and definition of terms is as follows: "Words and phrases shall be taken in their plain, or ordinary, and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import." Subject, nevertheless, to this limitation, to-wit,—“Unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute.” 2 R. S. p. 339. As we have already seen, the plain, ordinary and usual sense of the term *indecent*, includes certain improprieties of language, as well as wrongful acts. Was it the intention of the law-makers to declare the use of such improper language a punishable offense in this form?

A statute relative to a misdemeanor of the grade and

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character of this, and prescribing so severe a penalty as the deprivation of liberty by imprisonment, ought to be clearly worded, so as to leave no doubt or ambiguity about its meaning, before it should be construed to include a large and undefined class of offenses against morality. Especially this ought to be the case where the practical operation of similar statutes had been before such enactment made to exclude those offenses. The statute, under such circumstances, should be in itself explicit, and should not depend for vitality upon another act defining the meaning of words. For instance, if the legislature had intended the term *public indecency* to be so understood in this act as to comprehend and punish improprieties of language, as well as improprieties of conduct, to which it had before that time been limited by the current of judicial decisions, a very few words would have made that intention manifest.

If the statute is given the broad construction contended for by the prosecution, who is to determine what peculiar phrases amount to an offense under it? Is the public sentiment of each locality to be reflected through the jury? Taking these things into consideration, we think it is plain that it was not the intention of the legislature to create, by this statute of definitions, a large class of new offenses, nor to say that a particular phrase, although it has not a technical meaning, shall be construed contrary to the current of judicial decisions.

Per Curiam.—The judgment is reversed.

E. A. Hannegan, for the appellants.

D. C. Chipman, for the state.

PORTER v. BYRNE and Another.

Where in a proceeding in attachment against real estate, there was no description of the property, in either the sheriff's return or the judgment:—

Held, 1. That the proceedings were void for uncertainty.

2. That they cannot be explained by extrinsic evidence.

APPEAL from the *Vanderburgh* Circuit Court.

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WORDEN, J.—This was an action brought to recover the south-west half of lot No. 60, in the city of *Evansville*. It is admitted that in *February*, 1823, one *Thomas E. Alsop* was the owner of the premises in controversy, and that he then conveyed the same by deed, duly executed, to the plaintiff.

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The defendants set up for defense an adverse possession in themselves and those under whom they claim for twenty years next before the bringing of the suit, and also a title in themselves derived from a sale of the premises by the sheriff, as the property of the plaintiff, on a proceeding in attachment against him by one *Thomas J. Dobyns*.

The cause was tried by a jury, which resulted in a verdict and judgment for defendants.

Motion for a new trial made and overruled, and exceptions taken, setting out the evidence.

Under the statute of limitations of 1843, which was in force when this suit was brought, an adverse possession, to be available, must have been exclusive and *continuous*, for twenty years, under such circumstances as to show the party to be occupying upon a claim of ownership, in himself, of the premises. *Law v. Smith*, 4 Ind. R. 56. Whether a different rule shall prevail under the statute of 1852, it is unnecessary to determine. The evidence in the case is, perhaps, somewhat conflicting, and leaves some doubt as to the *continuity* of the defendants' possession for the necessary period; but if there was no other question involved but the one of adverse possession, we should not disturb the verdict as not being supported by the evidence.

The defendants, in order to support their claim of title in themselves under the proceedings in attachment in the suit of *Dobyns v. Porter*, offered and read in evidence the record of said proceedings, over the objection of the plaintiff, which was overruled by the Court. From said record it appears, that the sheriff levied the attachment on "one-half of lot 60, in the town of *Evansville*," without designating the particular half, and there is nothing in the record to show what half was levied upon. The judgment in the

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attachment suit is, that "the estate *heretofore attached* by the attachment in favor of said *Thomas J. Dobyns*, belonging to the defendant, *Andrew Porter*, be sold," &c.

There is nothing in the entire proceeding to show what particular half of the lot was attached or ordered to be sold.

The defendants also offered in evidence a deed from the sheriff, by virtue of a sale under the proceedings in attachment (over the objections of the plaintiff which were overruled by the Court), for the *north-east* half of lot No. 60, in the town of *Evansville*. It will be observed that the deed describes the opposite half of the lot, from that in controversy in this suit.

Dobyns was the purchaser under the attachment, to whom the above deed was made, and under whom the defendants claim. The proceedings in the attachment, and the sale, were in 1823.

It may be further remarked, that the execution on the attachment, as recited in the sheriff's deed, commanded him to make the money, &c., "of the lands and tenements of *Andrew Porter* heretofore attached," without any description thereof.

In reference to this branch of the defense, the plaintiff asked the Court to give the following instruction, which was refused, and exception taken, viz.:

"The sheriff's return to the attachment in the case of *Dobyns v. Porter*, is void for uncertainty, and does not show the facts necessary to give the Court jurisdiction, without the appearance of the defendant or process served on him."

The Court thereupon gave the following charge, which was excepted to by the plaintiff, viz.:

"If the jury believe from the evidence, that the half of the lot, or particular part of it described in the complaint, is the same half lot which was levied upon by the writ of attachment in evidence in this case, and the same that was sold by the sheriff of *Vanderburgh* county on the writ of execution issued on the judgment in attachment in the same case, and the same that was intended to be conveyed by the sheriff's deed to *Thomas J. Dobyns*, also in evidence;

and that the same was misdescribed in the sheriff's deed by mistake; and that the said half lot in controversy is the one referred to in the return on the attachment, in the return to the execution, and in the sheriff's deed; and that the defendants have acquired the title then intended to be conveyed to *Dobyns* by the sheriff's deed, by proper conveyances; then the jury will be authorized to find that the defendants are equitably entitled to the premises, and to find a verdict in their favor.

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"If the facts are not sufficiently established by the evidence, the jury will leave the proceedings in attachment out of view in the consideration of this case, and determine the matters in controversy independently of those proceedings, as such proceedings are irregular on their face, and can only be made available in this case by such proof as above indicated."

It is urged by counsel for the appellant, that the charge above asked should have been given, and the one given by the Court should have been withheld, because the proceedings in attachment were void (at least so far as the property in controversy is concerned), and cannot be aided by any parol or extrinsic evidence, and in this view we concur.

We think the proceedings in attachment void for uncertainty as to the property attached and ordered to be sold; and that being matter of record they could not be explained by extrinsic evidence. They were *ex parte* proceedings without personal service on the defendant, who did not appear, and in such cases great strictness and certainty are required. There was no judgment, except *in rem*, and that against an uncertain one-half of the lot named. In the case of *Law v. Smith*, 4 Ind. R. 56, it was held that a levy on the property of the defendants without designation of the kind, quantity or value, without any memorandum removing the uncertainty, was void. In *Waters v. Duvall*, 6 Gill & Johnson, 76, it was held that a return by a sheriff to a writ of *fieri facias*, that he had levied it upon a part of a tract of land, was void for uncertainty.

In an attachment and sale of real estate, the property

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ought undoubtedly to be described with sufficient certainty to enable the purchaser to know the particular tract or parcel intended. This is not done in the case before us.

On the supposition that the sheriff *intended* to levy the attachment on the part of the lot in controversy in this suit, and sold the same, and intended to convey the same by his deed to the purchaser, we think that parol and extrinsic evidence is wholly inadmissible to show those facts.

The proceedings in attachment were matters of record, and where the law requires an entry to be made in a Court of justice of particular transactions, the official entry excludes all independent evidence of the transaction. 1 Phil. Ev. 425.

We are of opinion that the Court erred in leaving it to the jury to say whether or not the defendants had an equitable title derived from the proceedings in attachment, and that if so, they were authorized to find for the defendants. The charge asked by the plaintiff, above noticed, is substantially correct, and should have been given.

Had there been no other question involved in the case but the one of adverse possession, as before remarked, we should not reverse the case on the evidence before us, but inasmuch as the evidence on that branch of the defense is not clear, and as the jury may have found their verdict on the paper title set up, we think the judgment should be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded for a new trial.

J. G. Jones and *J. E. Blythe*, for the appellant (1).

C. Baker, for the appellees (2).

(1) Counsel for the appellant cited authorities as follows:

1. Adverse possession must be made out clearly and positively. *Jackson v. Sharp*, 9 Johns. 168.—*Wickham v. Conklin*, 8 *id.* 220. To make possession of 20 years a bar, it must be shown to have been open, notorious, actual, visible, exclusive and continuous. 2 Smith's Lead. Cas. 414.—*Jones v. Chiles*, 2 Dana, 35. Suing for trespass, paying taxes and speaking publicly of the claim, are not sufficient to constitute an adverse possession. *Lessee of Ewing v. Burnett*, 1 McLean, 267, affirmed by the Supreme Court of the United States in 11 Pet. 41.

2. Plaintiffs proceeding by attachment are held to great strictness. *O'Brien*

v. Daniel, 2 Blackf. 291.—*Robertson v. Roberts*, 1 A. K. Marsh. 247. The return of the attachment must describe the property attached. *Law v. Smith*, 4 Ind. R. 56. Extrinsic evidence is not admissible to explain proceedings in attachment. 3 Stark. Ev. 999.—Gresley's Eq. Ev., pt. 2, ch. 3198.

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3. An execution upon several judgments is void. *Doe v. Rue*, 4 Blackf. 263.

(2) Appellees' brief missing.

McFARLAND and Another, Executors, v. GARBER.

A bond given by a debtor to secure to one of his creditors a secret preference over the others, as an inducement to him to sign a deed of composition, or other substantially similar instrument, is fraudulent and void, notwithstanding the creditor stipulating for such preference may have been the last to sign such instrument; and the debtor himself may set up the fraud, in defense to a suit upon the bond.

Good faith is required in every arrangement or settlement made by an embarrassed debtor and his creditors, whether it amount strictly to a composition deed or not.

APPEAL from the *Jefferson* Court of Common Pleas. *Tuesday,*

May 25.

WORDEN, J.—This was an action by the appellants [as executors of *Barbara Forbes*, deceased,] against the appellee on a bond for the payment of 500 dollars. The complaint alleges that in the lifetime of said *Barbara*, to-wit, on the first of *May*, 1848, at the county of *Blair* in the state of *Pennsylvania*, the defendant executed and delivered to said *Barbara* his writing obligatory, (a copy of which is filed) whereby he bound himself to pay to said *Barbara* the sum of 500 dollars, as specified therein, in consideration of said *Barbara* executing a certain release of a claim held by her against said defendant, which claim she held as legatee of one *Christian Garber*, deceased; that on the first day of *June*, 1848, the said *Barbara* did, in consideration of the written obligation aforesaid, execute, by signing, sealing and delivering, the said release to said defendant, whereby, &c. The bond set out is as follows, viz.:

“Whereas *William Dorris*, executor of *Christian Garber*,

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deceased, claims to recover of me moneys said to be owing by me to *C. Garber* deceased, which I say are not owing justly or legally; and whereas *Barbara Forbes* claims to be the legatee of the one-sixth of the said *C. Garber's* estate—and whereas the rest of the legatees, with the exception of the said *Barbara* and one other, have released all claims against me on the terms contained in the release, which terms were on my part fulfilled, and the said *Barbara* has heretofore declined to sign said release; now, in order to obtain her release also, but not admitting that there is one cent due by me to said *C. Garber's* estate, know all men by these presents that I do hereby agree and bind myself to pay to the said *Barbara Forbes* the sum of 500 dollars, as a full consideration of her alleged claim and releasing it. Two hundred dollars, with interest from this date, on or before the first day of *May*, 1850, and the remaining three hundred dollars with interest thereon from this date, on or before the first day of *May*, 1852, without defalcation, for value received.

“Witness my hand and seal, this first day of *May*, 1848.

[Signed] *M. C. Garber*, SEAL.”

The defendant filed an answer of several paragraphs, embracing—1. A denial of each and every allegation in the complaint. 2. Want of consideration. 3. That on the 22d day of *October*, 1844, one *Charlotte Hanks* and *Jarvis Hanks*, her husband, *Michael Garber*, said *Barbara Forbes* and one *Mrs. Rutter*, who were devisees of said *Christian Garber* deceased, pretended to have, as such devisees, a claim against the defendant for a large sum of money, which claim was a lien on certain real estate and other property of the defendant; and for the purpose of compounding the same with the defendant, and to effect a general composition of said claim between the defendant and said devisees, the said *Hanks* and wife, and the said *Michael Garber*, executed the release aforesaid, for the consideration therein expressed and no other. And afterwards, on the first of *June*, 1848, the said *Barbara Forbes* signed and sealed the said release, for the consideration therein expressed, and for the further consideration that the defend-

ant had executed and given to her the said bond now sued on. That said bond was given without the knowledge or consent of the other compounding creditors, and was a fraudulent preference of the said *Barbara* over them, as an additional inducement to said *Barbara* to come into said composition, and execute said release, and for no other purpose or consideration whatever; wherefore, &c.

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Issues were formed, and the cause was tried by the Court. The Court found for defendant, overruled a motion for a new trial, and rendered judgment on the finding. Exception was duly taken to the decision, and the evidence is set out. It appears from the bill of exceptions, that the Court found for the defendant on the ground that the release mentioned was, in effect, a composition deed among the creditors of said *Garber*, and that the bond sued on was a fraud on said creditors.

The plaintiffs gave in evidence the bond sued on, and the release in question. The release offered relinquishes all claims which the legatees of *C. Garber*, deceased, held against the defendant, except such portion of said claims as they could make out of property then held by him. It is signed by all of the legatees except Mrs. *Rutter*. It was signed by some of the legatees in *October*, 1844, but not by Mrs. *Forbes* until *June* 1st, 1848.

On the part of the defendant, it was proven by one *Joseph Kemp* that, some time in 1844 or 1845, the defendant failed in business, and that the heirs and devisees of *Christian Garber*, deceased, claimed a considerable debt of the defendant—Mrs. *Forbes*, the plaintiff's testator being one of said devisees. Witness had been acting as agent, and, in some instances, as an attorney for defendant, and after his effects had been sold by the sheriff, a movement was got up by some of the heirs of *C. Garber*, deceased, and by the defendant, to obtain a full release and discharge of defendant from all the debts which he owed them as heirs of *C. Garber*, deceased. Some of them had signed the release. Mrs. *Forbes* who was entitled to one-sixth of the whole, under the will, refused to sign without some new or fresh obligation by the defendant to pay her. This delayed the

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matter some time, as the rest were to get nothing for so doing.

Finally, *William McFarland*, who acted for Mrs. *Forbes* in the matter, told witness that 700 dollars would be her share of the debt if he paid it all. Witness suggested that he had better modify the amount a little. Something was said about 500 dollars, for which amount defendant subsequently agreed to give her an obligation. This was finally agreed upon, and it was also, at the same time, agreed that the rest of the heirs of *C. Garber*, deceased, were not to know anything of this arrangement. Mrs. *Forbes* refused to sign the release until she got the bond, when she signed it, and so far as witness knows, she did not tell any of the rest what she got for signing the release. The bond sued on was given to get the release signed by Mrs. *Forbes*.

It is admitted by counsel for the appellants, that if the paper in question called a release, the execution of which being the consideration of the bond in suit, be a composition deed, the bond in suit is void, as being a fraud upon the other parties to the release. In the case of *Kahn v. Gumberts*, 9 Ind. R. 430, involving a similar question, the Court say that, "In transactions between a debtor and his creditors which result in a deed of composition, the utmost good faith is required. The debtor professes to deal upon equal terms with all the creditors who enter into the settlement, and they are supposed to stand in the same situation. This, then, being the principle upon which the compromise rests, it would seem to follow that the debtor, when he induces one creditor to assent to the arrangement by giving him a secret preference over the other creditors, is guilty of a fraud in obtaining the composition deed; because it must be presumed that such other creditors, had they known of such secret preference, would not have assented to the composition."

The case of *Kahn v. Gumberts*, *supra*, differs from the present in this, that in that case the question was whether the *composition* was void, and whether a creditor having executed it in good faith, without any knowledge that a secret preference had been given to another creditor, could

recover on his original claim, and set up the fraud in avoidance of the composition,—the Court holding that he could. The question here is, whether the original debtor can set up the fraud in avoidance of the bond given to secure the secret preference.

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The Courts are so careful to preserve the highest degree of good faith among creditors, that the debtor himself, on grounds of public policy, is allowed to set up this defense against his own agreement. Upon this point the authorities are numerous. *Cockshott v. Bennett*, 2 Durnf. & East, 763.—*Leicester et al. v. Rose*, 4 East, 372.—*Case v. Gerish*, 15 Pick. 49.—*Stuart & Brother v. Blum & Simson*, 4 Penn. State R. 225. The case last cited is, perhaps, peculiarly applicable, as being decided in the state where the release and bond in suit were executed. The Court say in this case that—"The Court [below] also ruled that the agreement of *Blum & Simson*, of even date with the general release, was void in the hands of the plaintiffs, on the ground that, being parties to the composition agreement, it was not competent for them to take from their debtors a secret agreement for more than their fellow creditors were to receive. This doctrine is agreeable to those principles of open and fair dealing which should characterize all mercantile transactions, and is sustained by the authorities cited," &c.

Without undertaking to determine whether the release in question is strictly a composition deed, in the ordinary legal acceptation of that term, we should examine the substance and effect of it. It may be stated, as a general proposition, that good faith is required in every arrangement or settlement made by an embarrassed debtor, on the one side, and a community of creditors on the other, whether the arrangement amount strictly to a composition or otherwise. In *Leicester v. Rose*, *supra*, a trust deed was executed by the creditors, whereby they agreed to accept payment of their whole debts by certain installments, the first four of which were to be guaranteed by collateral security, and the last two to remain upon the single security of the insolvent.

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Some of the creditors stipulated with the debtor privately, as the condition upon which they would sign the deed, that he should give them collateral security for the last two installments, as well as the others. Here was no compounding, nor indeed was there any agreement, that one creditor should receive more than another. They were all to receive their entire debts, but some were to receive an additional security not contemplated by the trust deed, and the stipulation for such additional security was held void, as a fraud upon the other creditors. *Le Blanc, J.*, remarks upon the case as follows: "This case only differs thus far from the others, that this is not a deed of composition, in the common acceptation of the term, because it provides that every creditor shall ultimately receive his full demand; it is more like a letter of license. But it is clear upon the face of it, that the creditors at large were not satisfied with the personal security of their debtors, for they required collateral security for a part of their demands. Such being the agreement, whether entered into at a meeting of all the creditors assembled for the express purpose, or impliedly by their affixing their signatures to the same deed carried around to each separately, and signed by all; is it not a fraud upon the creditors at large, if the plaintiffs, having holden out to them that they would come in under the general agreement, have, notwithstanding, stipulated for a further partial benefit to themselves? And there is no difference, in substance, whether a creditor stipulate for what he thinks will produce him money more certainly, or for a larger sum of money than he had agreed to take in common with the other creditors; it is equally a fraud upon the other creditors to stipulate for either."

The effect of the release in question is a relinquishment of all claims of the description named in the release which the creditors hold against the debtor, except what they could make out of the property then held by him. This might amount to a composition—a receiving of part for the whole—or the creditors might fail to make anything out of the property; or they might realize their entire claims; but this can make no difference in respect to the principles of

law which should govern the case. The bond sued on was to secure Mrs. *Forbes* 500 dollars more than the other creditors were to receive. This bond, we must infer from the evidence, was entered into secretly, and without the knowledge of the other creditors. The witness, *Kemp*, testifies that at the time the bond and the execution of the release by Mrs. *Forbes* were agreed upon, it were also agreed that the other creditors of *C. Garber* were not to know anything about it.

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On the whole, we are of opinion that the bond in suit is void, and that the defendant can avail himself of the defense.

It is suggested by counsel for appellants, that, inasmuch as Mrs. *Forbes* was the last to sign the release, the others could not have been influenced by her action in that respect, and that, therefore, no fraud was practiced upon them which would avoid the transaction. But the authorities are the other way. In *Knight v. Hunt*, 15 Eng. Com. Law Rep. 488, this point was directly made. The party securing an advantage in the case, was the last to sign the composition, and the agreement securing him a preference was held void.

It is argued that if the release have the effect of a composition deed to be signed by all the devisees of *Christian Garber*, deceased, it was not valid as to those who did sign, until signed by all; and those who had signed not being bound, and Mrs. *Forbes* knowing that fact, she had a right to negotiate for herself independently of the others, and make the best compromise for herself that she could. In support of the position that the release is not operative as to any until it is signed by all, the case of *Reay v. Richardson*, 2 C. M. & R. 422, is cited. Without determining whether this position is correct or not, it may be remarked that if so, it could not benefit the appellants. If the position be correct, the release is still inoperative and void, not having been executed by Mrs. *Rutter*, one of the legatees, and the bond in suit would appear to have been given without consideration, a defense set up in the answer.

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SCOTT
v.
MILLARD.

Per Curiam.—The judgment is affirmed with costs.
J. Sullivan, for the appellants (1).
W. M. Dunn, J. W. Hendricks and *T. T. Crittenden*, for the appellee.

(1) Mr. *Sullivan* cited *Cockshott v. Bennett*, 2 T. R. 763; *Leicester v. Rose*, 4 East, 372; *Feise v. Randall*, 6 T. R. 146; *Reay v. Richardson*, 2 C. M. & R 422.

(2) Counsel for the appellee cited *Steinman v. Magnus*, 11 East, 390; *Cockshott v. Bennett*, 2 T. R. 763; *Leicester v. Rose*, 4 East, 372; *Lewis v. Jones*, 4 B. & C. 506; *Horton v. Riley*, 11 M. & W. 492; *Howden v. Haigh*, 11 Ad. & El. 1033; *Patterson v. Boehm*, 4 Penn. State R. 507; *Mann v. Darlington*, 3 Har. or 15 Penn. State R.; *Knight v. Hunt*, 5 Bing. 432; Chit. on Cont. 659; *Holmes v. Love*, 3 B. & C. 242; *Wells v. Greenhill*, 5 B. & A. 869.

SCOTT and Others v. MILLARD.

Tuesday,
May 25.

APPEAL from the *Tippecanoe* Circuit Court.

Per Curiam.—Suit upon a note governed by the law merchant. One of the defendants resided in *Tippecanoe*, and others in *Vigo* county. All were served with process. Rule taken for answer. Judgment by default.

The suit was rightly instituted in *Tippecanoe* county, as one of the defendants resided in that county. 2 R. S. p. 34, § 33.—1 *id.* p. 379, § 16. The Court, therefore, had jurisdiction of the parties, as well as of the subject-matter.

An objection is taken that the record does not appear to be signed by the Circuit judge. The statute does not require the signature of the judge to be repeated after every entry, but at the close of each day's proceedings. 2 R. S. p. 8, § 22. The transcript in this case is certified by the clerk to be of an entry of record among the proceedings of a given day. This is sufficient. We presume the day's proceedings were signed at the close. See *Draggoo v. Graham*, 9 Ind. R. 212.

All the other objections in the case are answered by *Case v. The State*, 5 Ind. R. 1; *Biddle v. Willard*, 10 *id.* 62; *Ellis v. Miller*, 9 *id.* 210; *Langdon v. Bullock*, 8 *id.* 341. May Term,
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The judgment is affirmed, with 5 per cent. damages and costs. WILKINS
v.
DE PAUW.

C. Y. Patterson, for the appellants.

H. W. Chase and *J. A. Wilstach*, for the appellee.

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APPEAL from the *Marion* Circuit Court.

Per Curiam.—The question presented in this case is— Tuesday,
May 25.
Can a sale upon the foreclosure of a mortgage, made by a commissioner appointed by the Court for the purpose, with the consent of the parties, be held void collaterally?

We are clearly of opinion it cannot. We do not mean to imply that it could in a direct proceeding. See 2 R. S. p. 157. It would be a judicial question arising in the cause below, even had there been no consent or waiver by the parties, whether this was a case for the appointment of a commissioner.

The judgment is affirmed with costs.

D. McDonald and *A. G. Porter*, for the appellant (1).

H. C. Newcomb, *J. S. Harvey* and *J. C. Tarkington*, for the appellee (2).

(1) Counsel for the appellant cited 2 R. S. p. 239, § 3; *Id.* p. 176, art. 34; 2 R. S. pp. 143, 144; Acts of 1849, p. 27; *Darvin v. Hatfield*, 4 Sandf. 468; 2 Hill. on Mortg. pp. 200, 210; *Parkinson v. Hanna*, 7 Blackf. 400.

(2) Counsel for the appellee cited *Stoney v. Shultz*, 1 Hill, 465; 2 Hill. on Mortg. p. 203, § 43; *Darvin v. Hatfield*, and cases cited, 4 Sandf. p. 468; 2 Hill. on Mortg. p. 210, §§ 84, 85, 86.

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BURKE v. MOORE.

CLAPPER
v.
BAILEY.

Wednesday,
May 26.

APPEAL from the *Shelby* Circuit Court.

Per Curiam.—Suit commenced in 1851 by *Burke* for the use of *Doble*, upon a promissory note. Pleas of payment, and accord and satisfaction, to and with *Burke*, and of fraud, want of consideration, &c. Issues. Trial and judgment for defendant.

The Court refused to instruct the jury that *Moore* could not, by obtaining a receipt from *Burke* (the payee of the note) that he had paid the said note to him, prevent *Doble* from recovering the amount of the note, from the maker, in the name of *Burke*, the payee, if *Moore* knew, when he paid the note to *Burke* that *Doble* was the equitable owner thereof, though it had not been assigned to him by indorsement.

We think the instruction asserts a correct abstract principle of law. *Ford v. Rehman*, Wright (O. R.), 434, is a case in point. But we think the decision right upon the evidence. *Doble* does not appear to have been the *bona fide* owner of the note.

The judgment is affirmed with costs.

M. M. Ray, for the appellant.

W. J. Peaslee, for the appellee.

CLAPPER and Another v. BAILEY.

Wednesday,
May 26.

APPEAL from the *Blackford* Circuit Court.

Per Curiam.—Motion to set aside an execution and sale. Motion sustained.

Facts: There was an appeal from a judgment below to the Supreme Court. The judgment was affirmed; but before a session of the Circuit Court after the affirmance, and, of course, without any order of that Court to enter

the opinion of the Supreme Court upon the record, the clerk, in vacation, issued an execution upon the judgment. May Term,
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The appeal-bond having been filed, stayed proceedings in the Circuit Court for three years, unless the stay was sooner removed by order of the Supreme Court. We think the clerk of the Circuit Court had no authority to act in the premises during that time, if he would have afterwards, till ordered by the Circuit Court. It was held under former statutes that there could be no action in the Circuit Court in a case thus appealed to the Supreme Court, till the opinion of the Supreme Court was spread upon the record of the Circuit Court by order of that Court. See 2 R. S. p. 8, note. The certificate from this Court is to the Court, not to the clerk, below. There may be modifications directed to be made in a judgment that is affirmed. The Court below must judge of this. See 2 R. S. p. 161, §§ 569 to 573 inclusive.

The judgment is affirmed with costs.

W. March, for the appellant.

J. S. Buckles, for the appellee.

ALEXANDER v. MOUNT.

A party to a bet may recover from the stakeholder the amount deposited in his hands, if he notify him not to pay it over while it is yet in his possession. If after such notice the stakeholder pay the wager to the winner, the loser need not make a demand before suit.

APPEAL from the *Fayette* Court of Common Pleas. Wednesday,
May 26.

Per Curiam.—Suit to recover from the stakeholder money bet upon an election.

Answer, that it had not been demanded before suit. As the suit was commenced before a justice of the peace, no reply was necessary to form an issue for trial. 2 R. S. p. 458, § 37. There was judgment for the defendant.

It is held in *New York* that a party to a bet cannot re-

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cover from the stakeholder the amount staked, unless he notify him not to pay it over before the contingency has happened on which its payment depended. *Fowler v. Van Surdam*, 1 Denio, 557. But the great weight of authority is, that it may be recovered if the stakeholder be so notified at any time before he has paid over the amount. See the cases collected in Smith on Cont., Rawle's Ed., top p. 257. See, also, *McHatton v. Bates*, 4 Blackf. 63.

But the question remains, whether the money must not have been actually demanded by the plaintiff before he instituted his suit, in order to enable him to maintain it. A notice not to pay it to the winner, might not amount to a demand to repay it to the depositor. And, generally, a bailee cannot be sued till after demand, unless he has wrongfully converted the thing bailed. *McGillicuddy v. Cook*, 5 Blackf. 179.—*Underwood v. Tatham*, 1 Ind. R. 276.—*Hanna v. Phelps*, 7 id. 21.—*Cox v. Reynolds*, id. 257.—5 id. 146, 220.

But where, as is shown in this case, the stakeholder had paid over the money after the countermanding notice and before suit, a demand would be excused.

The judgment is reversed with costs. Cause remanded, &c.

N. Trusler and G. Trusler, for the appellant (1).

S. Heron, for the appellee (2).

(1) Counsel for the appellant cited Chit. on Cont. 621; 11 Johns. 1.

(2) Mr. Heron cited 12 Johns. 1; 13 East, 20; 4 Camp. 37.

WALLACE v. THE ASSOCIATE REFORMED CHURCH.

In a doubtful case, a sale of real estate made by trustees of an express trust to one of their number, will be set aside.

The Courts will scrutinize such transactions, where trustees are parties, with the greatest care, especially where they are promptly brought before a Court, and rights have not intervened affecting the case with hardship.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Suit to set aside sales of real estate.

The leading facts of the case are these:

In *July*, 1853, *William Anderson* and wife deeded “to *William Hutchinson*, *William W. Miller* and *Alexander Harbison*, trustees of the *Associate Reformed Church of Indianapolis*, state of *Indiana*, and their successors in office, for the benefit and uses of said church,” a lot of ground in the city of *Indianapolis*. The deed was duly recorded.

In *November*, 1853, the said *Hutchinson*, *Miller*, and *Harbison*, sold said lot with the improvement on it—a parsonage house—to *Hutchinson*, one of their number, for 1,000 dollars, which was applied in paying debts of the church. The lot was deeded to *Hutchinson*, and the deed recorded. *Hutchinson* expended 30 dollars in improvements, and received some 50 dollars of rent.

In *April*, 1854, he sold the lot to *Wallace* for 1,500 dollars, and made him a deed.

In 1855, the church instituted this suit to set aside the deeds to *Hutchinson* and *Wallace* and recover the property.

Issues of fact were formed involving the validity of the sale, were tried by a jury, and a special finding was rendered, asserting certain facts, ignoring certain facts, and expressing doubts as to others, but containing no general verdict for either party. The evidence is not upon the record. The Court found the equity of the case to be with the plaintiff, and that the defendant held the property in trust—adjusted the accounts for rent, improvements, &c., and determined that the church should receive back the property on paying into Court for *Wallace*, the defendant, the sum of 1,070 dollars and 30 cents—that *Wallace*, on the paying in of the money should convey, &c. The money was paid in, and *Wallace* ordered to convey. He appealed from the decision against him.

The case having been made to turn below upon the facts, as well as law, involved, we are not able to bring it within any rule by which it can be reversed in this Court. The judgment below must be affirmed. In a doubtful case, sales made under circumstances similar to those in the pre-

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sent, would be set aside. Courts will scrutinize such transactions, where trustees are parties, with the greatest care, especially where promptness is exercised in bringing them before a Court, and rights have not intervened affecting the case with hardship.

Per Curiam.—The judgment is affirmed, with costs.

H. C. Newcomb and *J. S. Harvey*, for the appellants (1).

J. L. Ketcham and *L. Coffin*, for the appellees (2).

(1) Counsel for the appellant cited R. S. 1843, pp. 396, 397, §§ 45, 47; 1 R. S. 1852, p. 460, §§ 11, 13; 2 *id.* p. 27, § 3.

(2) Counsel for the appellees cited 7 Blackf. 16; 4 Wheat. 77; Nashes Dig. p. 470, § 13; 4 Ohio R. 446, 458; Story on Agency, p. 268, § 210; *Ward v. Smith*, 3 Sandf. Ch. 592, 596; *Adams's Eq.* 184, *et seq.*; *Davous v. Fanning*, 2 Johns. Ch. 260.

TEA v. GATES.

If in a suit for the value of property wrongfully taken, under circumstances rendering it impossible for the plaintiff to know its amount or value, the defendant fail to show the same, the jury must solve all doubts in relation to amount and value most strongly against the defendant.

Wednesday,
May 26.

APPEAL from the *Tippecanoe* Court of Common Pleas.

HANNA, J.—*Gates* instituted a suit against *Tea* before a justice of the peace for the value of certain corn, and recovered judgment for 50 dollars and 58 cents. The defendant appealed. Trial in the Common Pleas, and judgment for the plaintiff for 58 dollars and 95 cents. The defendant brings the case here.

The evidence is in the record, and shows that the plaintiff rented of the defendant, in 1854, some twenty-seven or twenty-eight acres of land, which was planted in corn; and is conflicting as to the amount of rent that was to be paid—whether it was one-half in the field, each party to gather his own, or eighteen bushels per acre, to be by the tenant delivered in the crib of the landlord. *Gates* gathered the corn raised on the greater portion of the ground, taking and

leaving every alternate ten rows, as is shown. There is some conflict as to the amount of ground not gathered over—from seven to ten acres—and also as to the amount of yield. Several witnesses testified as to that point, varying between nineteen and thirty-eight bushels per acre. The defendant, after the corn was thus partly gathered by the plaintiff, took possession of and gathered what stood in the field—the alternate rows left for him, and all of the seven to ten acres.

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Upon this state of facts, the Court gave to the jury an instruction asked by the plaintiff, and refused others asked by the defendant, which are the rulings complained of.

The instruction given was as follows:

“If the jury believe from the evidence, that *Tea* took the corn of *Gates* wrongfully, and there are doubts as to the amount or value of the corn so taken, such doubts should be solved most strongly against *Tea*, who by his wrongful act caused such doubts.”

The first instruction asked by the defendant, and refused, was clearly erroneous, and, therefore, need not be further noticed. The second was as follows:

“It is the duty of the plaintiff, before he is entitled to recover, to prove all the material facts upon which he relies for such recovery, and if doubts exist as to where the preponderance of the evidence is, those doubts must inure to the benefit of the defendant.”

There being a conflict of testimony as to the amount of rent to be paid, and, indeed, an absence of any direct evidence upon the point, the acts of the parties might be received to show what was their understanding. As, in this case, the tenant went into the field and gathered for himself certain portions of the corn, leaving for the landlord, who followed and gathered the same, equal portions, certainly this act, together with the other evidence, was sufficient to justify the jury in determining that each party was entitled to one-half standing in the field. Therefore, the landlord would have no right to take and appropriate to his own use the half which belonged to the tenant. But if the evidence offered by the landlord of the terms of the

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renting, to-wit, that he was to have eighteen bushels per acre delivered in his crib by the tenant, was true, that would not, of itself, give him the right to go and take the whole crop without measurement. Perhaps, strictly speaking, he would be driven to his action for the non-payment, unless there were circumstances, such as unreasonable delay in payment, and insolvency of the tenant, which might justify the act.

In either view of the question, there is nothing in the pleadings and evidence in this case which would divest the acts of the defendant of their wrongful character.

This suit is not in the nature of an action of trespass, but is for the value of the corn thus taken by the landlord, which, it is alleged, belonged to the tenant. Under these circumstances, we think that although the plaintiff in effect waived the tort, and brought suit for the value of the corn only, yet when the circumstances were detailed, it was manifest that the defendant, by his own wrongful act, placed it out of the power of the plaintiff to show how much corn was taken, and failed himself to prepare that kind of convincing proof which he might have availed himself of. He is, therefore, not in a condition to complain of the instruction given.

In the leading case of *Armory v. Delamirie* (1 Strange, 504), 1 Smith's Leading Cases, 151, the plaintiff a chimney-sweep's boy, found a jewel, and upon presenting it to a goldsmith to know what it was, the smith's apprentice removed the stones from the socket and gave that back, but refused to surrender the stones; and in an action of trover to recover them, the plaintiff was permitted to prove what a jewel of the finest water, that would fit the socket, would be worth; and the jury were instructed that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of damages. *Id.* 153, and cases cited. That case differed from the one at bar in this, that the jewels having been traced to the possession of the defendant, the presumption was he had them at the time of trial, and if he would produce them

they would be the best evidence of their quality, &c.; and failing to do so, it "afforded occasion for strong presumptions against him." 1 Stark. Ev. 35. In this case, it was not shown whether the property was yet in the possession of defendant, but it was traced there, and was of a kind of property that would not probably remain very long in his possession; yet in gathering it, the defendant could have ascertained the precise quantity, and having failed to do so, or to show that the property was not yet in his possession, we think the instruction was properly given. See *West v. Brady*, 6 Ind. R. 395; 2 Blackf. 383.

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Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

G. S. Orth and *J. A. Stein*, for the appellant (1).

S. A. Huff, *Z. Baird* and *J. M. LaRue*, for the appellee.

(1) Counsel for the appellant made the following point: The instruction given was erroneous. The idea upon which it was grounded was, that *Tea*, by entering *Gates's* land and taking more than his share of corn, (assuming that the rent was one-half to be gathered by *Tea* himself,) made himself a trespasser *ab initio*; and that, hence, all doubts in the testimony should be construed most strongly against him. This, we conceive, was an erroneous supposition. *Tea* having by the terms of the lease received license to enter *Gates's* land, his subsequent abuse of that license could not make him a trespasser *ab initio*. And herein a distinction lies between the abuse of a license granted by the party complaining, and one granted by law—as, to a sheriff in case of arrest. In the latter instance, an abuse of the authority makes a trespass *ab initio*; not so in the former. *The Six Carpenters' Case*, 4 Co. 290; Bac. Abr. title Trespass, B; *Allen v. Crofoot*, 5 Wend. 506; Cowen's Treatise, 369.

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Where testimony is objected to, the ground of the objection must be stated.

A party cannot assign as error the refusal of an instruction, if the Court has given an instruction of the same purport, equally favorable.

An instruction to the effect that parol evidence of the contents of a written warranty is not admissible unless it be shown that the instrument is lost, destroyed, or mislaid, is erroneous. Such evidence is admissible where the instrument is in the hands of the opposite party, and he fails to produce it on proper notice.

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Where positions taken against the judgment below are not argued or supported by authority, they may be considered as waived.

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APPEAL from the *Warren* Court of Common Pleas.

Wednesday,
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WORDEN, J.—This was a suit upon a promissory note, by the appellants against the appellee, for the sum of 125 dollars.

Answer, that the note was given for a mowing-machine, alleging a warranty of the machine, a breach of the warranty, and a return of the machine to the plaintiffs, after due trial, and within a reasonable time, and an acceptance of the machine by the plaintiffs on the return thereof, whereby the consideration of the note had failed.

Replication in denial.

Trial by a jury, and verdict for defendant. Motion for new trial overruled, and judgment on the verdict.

There is a bill of exceptions filed which shows that the decision of the Court in overruling the motion was excepted to, but it does not purport to contain all the evidence. Therefore we cannot inquire whether or not the verdict was sustained by the evidence, but must presume it was. The bill of exceptions shows, that the Court permitted certain evidence to go to the jury, over the objections of the plaintiffs, which, amongst other things, is assigned for error. The record does not inform us that the plaintiffs pointed out to the Court below the grounds of their objections to the testimony. The law is well settled that when an objection is made to testimony, the grounds of the objection must be pointed out, or stated, and that a general objection is insufficient. *Church et al. v. Drummond*, 7 Ind. R. 17; *Bird et al. v. Lanius*, id. 615.

The plaintiffs asked the following instructions, which were refused, and exceptions taken, viz.:

“That if the defendant has a guaranty with the machine, and he refuses to produce it, it raises a presumption against him that, if it was produced, it would operate against him.

“That parol evidence of the contents of a warranty in writing or printing cannot be given to the jury, unless it is proved by the affidavit of the defendant, or evidence of

any other person, that the said warranty is lost, destroyed or mislaid.”

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There was no error we think in refusing the first of these instructions, inasmuch as the Court gave another charge, at the instance of the plaintiffs, which goes much farther in their favor than the one refused. It was as follows:

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“If it be proved that the defendant has a guaranty with his machine, and he refuses to produce it, the jury will disregard any representation or evidence in regard to the insufficiency of the mowing-machine.”

In the charge refused, the Court were asked to charge that the failure to produce the guaranty, would raise a presumption against him, &c., but in the one given the Court charge that the jury will disregard any evidence of the insufficiency of the machine. That goes to the very foundation of the defense, and the plaintiffs, at least, have no cause to complain.

As the evidence is not all before us, we have no means of determining whether the other charge asked and refused was applicable to the case or not. On the supposition that it is correct as an abstract proposition of law, we must presume it was inapplicable, and therefore refused. *Johnson v. Vuthrick*, 7 Ind. R. 137. But it is not correct as an abstract proposition of law. There are cases where parol evidence of the contents of written instruments is admissible without proof that they are either lost, destroyed, or mislaid. As, for instance, where the instrument is in the hands of the adverse party, and he fails to produce it on proper notice. There is no error in the refusal to give this instruction.

The Court gave to the jury several instructions to which the plaintiffs excepted; but we see no substantial objections to them. We have not examined them very critically, because no objection has been pointed out. The counsel for the plaintiffs, in his brief, merely says that he thinks from the evidence recited (alluding to the evidence admitted over his objection and set out in the bill of exceptions), that the instructions should not have been given.

It is said in *Payne et al v. McClain*, 7 Ind. R. 139, that

May Term, 1858. where the positions taken against the judgment below, are not argued, or supported by authority, they may be re-

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v.
BRIDEGROOM. regarded as waived.

Per Curiam.—The judgment is affirmed with costs.

R. A. Chandler, for the appellants.

J. R. M. Bryant, for the appellee.

GRIFFIN v. GRIFFIN.

Wednesday,
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APPEAL from the *Wayne* Court of Common Pleas.

Per Curiam.—This was a proceeding to obtain the partition of real estate.

The Court found the respective shares or interests of the parties. The defendant moved for a new trial. Motion overruled, and exception taken. Appeal prayed and refused. Commissioners appointed to make partition. Appeal then granted.

There was no appeal until the report of the commissioners was returned and the proceeding finally disposed of by that Court. Otherwise, there might be another appeal from an order of the Court subsequently made that the land should be sold, if the report authorized such order, and then from the final order.

Appeal dismissed with costs.

G. W. Julian and *J. B. Julian*, for the appellant.

O. P. Morton, for the appellee.

THE STATE on the relation of FISHER and Another v. BRIDEGROOM.

An affidavit for surety of the peace is not bad for being in the alternative as to the injuries feared.

APPEAL from the *Pulaski* Court of Common Pleas.

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Per Curiam.—This was a prosecution instituted by husband and wife against *Bridegroom*, for surety of the peace. The defendant was recognized by a justice to the Common Pleas Court; but on his motion the case was there dismissed for want of a sufficient affidavit, and judgment rendered against the complaining witnesses for costs.

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There has been no defect in the affidavit pointed out to us; but we suppose it was adjudged bad because it was in the alternative as to the fears of affiants of bodily injury to themselves, or some member of their family. An affidavit in this form has been held good. 8 Ind. R. 458.

If the motion to dismiss, or quash, had been properly sustained, the judgment for costs against the complaining witnesses would, under the provisions of the statute, and the circumstances of the case, have been wrong. 2 R. S. p. 501, § 27.

The judgment is reversed with costs.

H. P. Biddle and *B. W. Peters*, for the state.

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The submission of a cause to this Court on an agreed statement of facts does not excuse the failure to move for a new trial below.

APPEAL from the *Bartholomew* Circuit Court.

Wednesday,
May 26.

WORDEN, J.—This was an action brought to recover a town lot in the town of *Columbus* in said county, by the appellees against the appellants. The cause was submitted to the Court for trial on an agreed statement of facts, which resulted in a finding and judgment for the plaintiffs below, the appellees.

The appellants have assigned for error the decision of the Court upon several demurrers filed in making up the

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issues; but as no exception was taken we cannot notice them.

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v.
CLIFTON.

There was no motion for a new trial in the Court below, and consequently there is nothing before us. We are of opinion that the principle which requires a motion for a new trial below, that the Court may have an opportunity of reviewing its decision, and correcting any errors it may have fallen into, is as applicable to a cause submitted on an agreed statement of facts, as any other. *The State ex rel. Foster et ux. v. Swarts et al.*, 9 Ind. R. 221.

Per Curiam.—The judgment is affirmed with costs.

R. Hill, for the appellants.

W. F. Pidgeon, for the appellees.

PENNINGTON v. CLIFTON.

The purchaser at sheriff's sale of land to which the execution-debtor has no title, can recover from the debtor the amount of the purchase-money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor. The complaint, in such case, need not allege a demand.

Wednesday,
May 26.

APPEAL from the *Hendricks* Circuit Court.

DAVISON, J.—The appellant was the plaintiff, and the appellee the defendant. The complaint charges that one *Aaron Talbee* recovered a judgment in the *Putnam* Circuit Court against *Andrew Clifton*, the defendant, for 532 dollars; that the sheriff, by virtue of an execution issued on said judgment, levied upon and exposed to sale a certain tract of land, supposed to be the property of *Clifton*, and that *Pennington*, the plaintiff, believing the land to be *Clifton's* purchased it at the sheriff's sale for 667 dollars, paid the purchase-money, and received a deed pursuant to the sale; that at the time of the judgment, levy and sale, one *John Clifton*, and not the defendant, was, and still is, the owner of said land in fee simple, and that such ownership

was at all times, until after the sale and conveyance by the sheriff, unknown to the plaintiff. It is averred that the plaintiff has fully paid and satisfied the above judgment; and that the defendant, though he had no title whatever to the land sold, refuses to repay, &c.

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1858.

PENNINGTON
v.
CLIFTON.

Demurrer to the complaint sustained; and final judgment for the defendant.

Muir v. Craig, 3 Blackf. 293, decides that the purchaser at sheriff's sale, of land to which the execution-debtor had no title, could recover from the debtor in equity, the amount of the purchase-money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor. This decision obviously applies to the facts stated in the record and seems to be decisive of the case at bar (1). Still, however, it is contended that the complaint is defective, because it does not allege a special demand on the defendant for the money advanced to the plaintiff. In general, when a debt exists payable immediately, the law does not impose on the plaintiff the necessity of stating a special request or demand in the declaration. The bringing of the action is itself a legal demand. Tomlins's Law Dic. 532.—*Ernst v. Bartle*, 1 Johns. Cases, 319. If the rule just stated be correct, and we think it is, the complaint must be held unobjectionable; because the consideration upon which the plaintiff paid the defendant's debt, having entirely failed, he became at once liable to refund. We are, therefore of opinion that a special demand before suit was unnecessary.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the appellant.

J. S. Miller, H. C. Newcomb, J. S. Harvey and J. S. Tarkington, for the appellee.

(1) See *Preston v. Harrison*, 9 Ind. R. 1.

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1858.

10	174
129	905
10	174
136	659
10	174
149	80
150	905
10	174
160	214
160	400

TATE

v.

THE OHIO
AND MISSIS-
SIPPI RAIL-
ROAD CO.

TATE and Others v. THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

The code (§§ 17, 18, 19, 2 R. S. pp. 30, 31) substantially reenacts the old equity rules for the joinder of parties.

All who are united in interest must join, unless they are so numerous as to render it impracticable to bring them before the Court.

Those who have a common or general interest may one or more of them bring an action.

But two or more persons having separate causes of action against the same defendant, though arising out of the same transaction, cannot unite; nor can several plaintiffs, in one complaint, demand several distinct matters of relief; nor can they enforce joint and separate demands against the same defendant.

Wednesday,
May 26.

APPEAL from the Dearborn Circuit Court.

DAVISON, J.—*William Tate* and ten others, each of whom owns lots of ground fronting on *Williams* street in the city of *Lawrenceburgh*, united in a complaint alleging their several ownerships in the lots, and charging that the railroad company has located her road upon and in the center of that street, along the whole length thereof, in front of, and opposite to, the lots of the several plaintiffs, and has, for a road-bed, erected in said street an embankment and trussel-work which excludes them from the street, and which is an insufferable nuisance. The prayer is, that the company, who was the defendant, may be compelled to fill up the street on each side of her railroad track, so as to make the street passable, or to remove the road, &c., and for other relief, &c.

There was a demurrer to the complaint, which the Court sustained, on the ground of a misjoinder of plaintiffs. And the only question to settle is—had they a right to join in the action?

The code requires all persons having an interest in the subject of the action, and in obtaining the relief demanded, except as otherwise provided, to be joined as plaintiffs. It also requires those who are united in interest to be joined as plaintiffs or defendants. And it then declares that when the question is one of common or general interest to many persons, or where the parties are numerous and it is

impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole. 2 R. S. pp. 30, 31, §§ 17, 19. These provisions substantially reenact the old equity rules on the subject of parties. All who are united in interest must join in the suit, unless they are so numerous as to render it impracticable to bring them all before the Court, while those who have only a common or general interest in the controversy, may, one or more of them, institute an action. This, however, must not be understood as allowing, in all cases, two or more persons, having separate causes of action against the same defendant, though arising out of the same transaction, to unite and pursue their remedies in one action. Several plaintiffs, by one complaint, cannot demand several matters of relief which are plainly distinct and unconnected; nor can they enforce joint and separate demands against the same defendant. But where one general right is claimed—where there is one common interest among all the plaintiffs, centering in the point in issue in the cause, the objection of improper parties cannot be maintained. 11 Barb. (S. C. R.) 516.—15 *id.* 375.—Van Santvoord's Pl. 130, *et seq.*—1 Barb. Ch. 59.

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1858.

TATE
v.
THE OHIO
AND MISSIS-
SIPPI RAIL-
ROAD Co.

This exposition of the rules adopted by the code in regard to the joinder of parties, at once shows the ruling of the Circuit Court to be erroneous. The plaintiffs, though not united in interest with each other, claim one general right to be relieved from a nuisance which alike affects all of them. In our opinion there was no misjoinder of parties. It follows that the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

P. L. Spooner and *A. Brower*, for the appellants.

J. Ryman and *W. S. Holman*, for the appellees.

May Term,
1858.

STATER
v.
HILL.

STATER and Others v. HILL.

Where a parol contract for the conveyance of real estate is fair in all its parts, is certain, is for a valuable consideration, does not interfere with the rights of creditors, and is capable of being performed, the Courts will generally decree a specific performance.

In this case the purchaser entered into possession of real estate under a parol contract of sale, the consideration of which was that he should support the grantor and his wife for life. He did so, and also made valuable improvements. *Held*, that the contract was taken out of the statute of frauds.

The finding of a Court upon issues of fact formed under the old practice, but tried under the new, is treated by this Court as if the suit had been instituted under the code.

Wednesday,
May 26.

APPEAL from the *Shelby* Circuit Court.

HANNA, J.—This was a proceeding commenced in 1851 by the appellee, under the old chancery practice, by filing a bill, to which there was an answer by a portion of the defendants, without oath, and a default as to others. The issues were made up under that practice. The trial was after our new code of procedure was in force.

The proceeding was to enforce the specific performance of a parol agreement for the conveyance of land. The bill alleges that about the first of *November*, 1847, one *William Jackson* and the complainant made an agreement by which said *Jackson* was to convey to said *Hill* the land in controversy, and certain personal property which said *Jackson* then owned; and in consideration thereof said *Hill* was to take charge and care of, maintain and furnish, the said *Jackson* and wife, who were both then in advanced age and feeble health, during their lives; that in pursuance of said contract, said *Hill* removed his family upon said lands, took possession of said property, and took charge and care of, and furnished and provided for, the said *William* until his death, which was within a few days thereafter, and of *Elizabeth*, the wife of said *William*, until her death, which was about four years and a half thereafter; that he caused them to be decently buried and paid their debts; that he has made valuable and lasting improvements upon said lands, to the amount of five hundred dollars; that when he

moved upon the land *Jackson* was sick, but promised as soon as his health would permit he would make a conveyance of said lands to said *Hill*; that within a few days, his health still declining, he sent for a justice of the peace to prepare a will by which to devise said lands to said *Hill*, but was not able so to do.

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1858.

STATES
V.
HILL.

The heirs of said *Jackson* are made defendants. The answer admits that *Jackson* was the owner of the land; that he and his wife died about the time stated in the bill; that the said *Hill* was living on the said lands at the time they died; but denies that the contract was ever made by said *Jackson* as alleged in the bill. The defendants then allege that said *Jackson*, in his lifetime, permitted the complainants to live on said land as a tenant at will, during the pleasure of the said *Jackson*, and in no other manner whatever; and that said *Jackson* and *Elizabeth*, his wife, fully paid said *Hill* for all his care and attention bestowed upon them, or either of them, during their lives; and that after their death said *Hill* took possession of, and used for his own purposes, the whole of their personal estate, of the value of 800 dollars, and has received to his own use the rents and profits of said land, of the value of 130 dollars per year. They deny that he made valuable improvements. The replication of the said *Hill* denies that he was upon said land as tenant at will, or that said *Jackson* ever paid him anything, &c. He denies that he appropriated to his own use the personal property or the rents, &c.

The case was tried by the Court. Finding for plaintiff; and, over a motion for a new trial, judgment was rendered upon the finding.

The only point made in the brief of the appellants, is upon the third error assigned, to-wit: That the finding and decree of the Court is contrary to the law and the evidence.

It is assumed that the finding and judgment are contrary to law, because specific performance of a verbal agreement for the conveyance of land, cannot be decreed under any circumstances; and we are referred to *Lester v. Bartlett*, 2 Ind. R. 628, as an authority for this assumption. The case cited does not sustain the appellants. That was a suit for

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ENSEY
v.
THE CLEVELAND,
LAND, & CO.,
RAILROAD CO.

the price of land sold on verbal contract. No part of the consideration had been paid, nor had possession been taken of the land.

It is said in *Atkinson v. Jackson*, 8 Ind. R. 33, that when the contract is fair in all its parts, is certain, is for a valuable consideration, does not interfere with the rights of creditors, and is capable of being performed, Courts will generally decree a specific performance.

“The purchaser’s taking possession of the estate, and making improvements on the same, under a parol contract of sale, have always been considered a sufficient part-performance to take the case out of the statute of frauds.” 4 Blackf. 385.

We think the bill shows a case entitling the complainant to relief. Issues of fact having been found upon some of the allegations of the bill, and having been tried by the Court since the adoption of our new practice, the same rule prevails in regard to disturbing such finding, as if the suit had been instituted since that code was put in force.

Upon looking into the evidence, we find the facts and circumstances detailed to be such as should properly be left to a jury, or the Court sitting as a jury, to determine, under the issues made; and, to say the least of them, strongly tending to sustain the finding of the Court. We cannot, therefore, disturb that finding.

Per Curiam.—The judgment is affirmed with costs.

C. Wright and *W. J. Peaslee*, for the appellants.

M. M. Ray, for the appellee.

If he deny its existence at a subsequent time, he must show how it ceased to exist.

Where a general denial is pleaded, special denials embraced by it are demurrable.

Suit upon a subscription of stock. The complaint set forth the article subscribed to, alleged performance on the part of the company, and a subsequent promise to pay, by defendant. Answer, 1. The general denial. 2. Payment. *Held*, that the latter was new matter, not provable under the general denial, and the paragraph setting it up was not demurrable.

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1858.

ENSEY

V.
THE CLEVELAND, & CO.,
RAILROAD CO.

APPEAL from the *Parke* Circuit Court.

Thursday,
May 27.

Per Curiam.—Suit by the *Cleveland and St. Louis Railroad Company*, against *Samuel T. Ensey*, upon a subscription of stock. The article subscribed to contained the following recitations and conditions: "We, the subscribers, do hereby severally agree with the directors of the *Cleveland and St. Louis Railroad Company*, a corporation duly organized in the state of *Indiana*, under an act entitled 'an act to provide for the incorporation of railroad companies,' approved *May 11, 1852*, to pay for the number of shares set against our names respectively, of fifty dollars each, subject to the provisions of the act aforesaid, and upon the following terms and conditions, viz: 1. That no assessment shall be levied upon the shares which shall be subscribed, exceeding two dollars and fifty cents per share, until ten thousand shares shall have been subscribed, and the said corporation shall have been duly notified of the organization of a company in the state of *Ohio*, ready and able to proceed simultaneously with the construction of a railroad," from the eastern terminus to *Cleveland, &c.*

There were other provisions in the article, not necessary to be recited here. The paragraphs in the complaint averred that all conditions had been performed and complied with on the part of the company, &c.; and one of them averred a subsequent promise to pay the installments. The defendant answered, denying each and every allegation of the complaint; and, also, in a paragraph averring that the assessments of stock sued for were, each and every one of them, illegal and void.

Issues upon these two paragraphs. Trial, and judgment for the plaintiff.

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1858.

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V.
THE CLEVELAND,
LAND, & C.,
RAILROAD CO.

The answer also contained ten paragraphs, to which demurrers were sustained.

The ruling upon the demurrers was right as to nine of the paragraphs, but erroneous as to the tenth. A part of the nine denied the existence of the corporation at the time of the contract. The defendant was estopped to do this. *The Brookville, &c., Co., v. McCarty, et al.*, 8 Ind. R. 392. A part denied its existence at a subsequent period, but failed to show how it had ceased to exist. They were bad for this reason. *Ibid.*

The others were special denials of the performance of the conditions precedent, alleged in the complaint to have been performed; and hence, were all, in substance, embraced in the general denial. The tenth of these paragraphs—the ninth, as numbered in the answer—went to the whole complaint, and alleged, generally, payment of the entire demand sued for. It was, therefore, a complete answer to the whole cause of action, (*Louden v. Birt*, 4 Ind. R. 566;) and the only question arising here upon it is, whether the matter of it—payment—was provable under the general denial. If so, the defendant would be presumed to have availed himself of the defense, if it existed, on the trial in the Circuit Court. *Elliott v. Wright*, 7 Ind. R. 374. If it constituted new matter, it was necessarily pleaded specially, and could not have been given in evidence under the general denial.

That it must be regarded as new matter, within the rule laid down in *McCarty v. Roberts*, 8 Ind. R. 150, we cannot doubt.

The judgment is reversed with costs. Cause remanded, &c.

D. H. Maxwell and *E. A. Hannegan*, for the appellant.
J. P. Usher, for the appellee.

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1858.

BALL v. ARMSTRONG.

BALL
v.
ARMSTRONG.

If a person in building obstruct a gutter with building-materials, and thereby cause water to flow into the cellar of another, he is liable in damages.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Thursday, May 27.*

Per Curiam.—*Ball* erected a building in *Lafayette*. During the progress of its erection he occupied the street in front of the building with building-materials. He also obstructed the gutter with those materials. While the gutter was thus obstructed there came heavy rains—freshets, and the water, instead of passing off in the gutter, was backed upon the lot, and flowed over into *Armstrong's* cellar, on the adjoining lot, causing injury thereto, and to the articles stored therein. *Armstrong* sued for damages and recovered 40 dollars.

Several objections are raised, of an unimportant character.

The merits of the case are in a nut-shell, as appears by the evidence. *Ball* had no right to obstruct the gutter. He did obstruct the gutter. That obstruction caused the water to flow into *Armstrong's* cellar. The overflow damaged him. *Ball* was liable for that damage.

The amount awarded is not excessive.

The judgment is affirmed with 5 per cent. damages and costs.

G. S. Orth, G. H. Brackett and J. A. Stein, for the appellant (1).

S. A. Huff, Z. Baird and J. M. La Rue, for the appellee.

(1) Counsel for the appellant made the following points:

1. In a populous city, the right which the owner of a lot has to improve it, may, and usually does, result in more or less damage to his neighbors; but he is not liable for consequential damages where he exercises proper care and skill. *Radcliff's executors v. The Mayor of Brooklyn*, 4 Comst. 200, *et seq.* See, also, *Etting v. The Bank of the U. S.*, 11 Wheat. 59; *Caldwell v. The U. S.*, 8 How. 366.

2. Among the reasons upon which the defendant's motion for a new trial was grounded was, the misconduct of one of the jurors in taking advantage of an adjournment of the Court to inform himself relative to a fact in the case. See *Barlow v. The State*, 2 Blackf. 114; Cowen's Treat. 899, 900. He had also,

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v.
HAMILTON.

at a previous trial involving the same question at issue in this, and against the same parties, expressed an opinion adverse to the defendant. He had not been sworn on his *voire dire*, but defendant's peremptory challenges had not been exhausted at his calling. *The People v. Vermilyea*, 7 Cow. 122.—1 Grah. & Wat. New Trials, 129, and cases cited.

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY v. KARGUS.

Thursday,
May 27.

APPEAL from the *Gibson* Circuit Court.

Per Curiam.—This was an action against the company, commenced before a justice of the peace, for killing the horse of *Kargus*. Damages laid at 110 dollars. Judgment for 110 dollars. Appeal to the Circuit Court. Finding for the plaintiff 110 dollars. Judgment for double the amount, 220 dollars, &c., under the act of *March 1, 1853*.

This judgment is erroneous. *Madison, &c., Co. v. White-neck*, 8 Ind. R. 217.

The justice of the peace had no jurisdiction of the case, because the sum demanded was over one hundred dollars. 8 *id.* 237.

The judgment is reversed with costs. Cause remanded with instructions to dismiss it.

C. Baker, for the appellants.

J. J. Chandler and *J. J. Harlan*, for the appellee.

SHAW v. HAMILTON.

Thursday,
May 27.

APPEAL from the *Randolph* Circuit Court.

Per Curiam.—This was an action by *Hamilton* against *Shaw* and others, to recover certain real estate. There was judgment in favor of the plaintiff.

During the progress of the cause, and before the trial commenced, a motion was made for a change of venue, founded upon the affidavit of *Shaw*, alleging that the plaintiff had an undue influence over the citizens of said county, and that an odium attached to said defendant, on account of local prejudice, &c. The motion was overruled.

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v.
NEILSON.

The venue should have been changed. 7 Ind. R. 110. The affidavit was sufficient. 2 R. S. p. 74.

The judgment is reversed with costs. Cause remanded with instructions to set aside the judgment, grant a new trial, and a change of venue.

J. Smith, for the appellant.

LAGOW and Others v. NEILSON.

10	183
136	422
10	183
147	401

Causes of demurrer designating the alleged defects in the pleading to which they relate, with a sufficient degree of certainty, are good, though not assigned in any approved form.

An amendment to a complaint generally has relation to the time the complaint was filed; but this is not so when the amendment sets up a title not previously asserted, involving a question upon the statute of limitations. As to new parties brought in by amendment in such case, the statute continues to run until the amendment is made.

An answer setting up an estoppel by deed as to certain plaintiffs, and denying the right of certain others, tenants in common with them, to join in the action, because of such estoppel, but not alleging that they were parties to the deed, is bad on demurrer.

By our statute of limitations (2 R. S. p. 77, § 216), the time during which a defendant is a non-resident, &c., is not to be computed in any of the periods of limitation fixed by statute, in either real or personal actions; but the concluding part of that section should not be so construed as to allow the law of limitation of another state to be used here in actions for the realty.

In deciding a reserved case, the Supreme Court cannot look beyond the questions of law reserved in the Court below.

APPEAL from the *Knox* Circuit Court.

Thursday,
May 27.

DAVISON, J.—This was an action of disseizin, commenced in *November*, 1843, by *Wilson Lagow* against *Hall Neilson*, for a tract of land in *Knox* county.

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LAGOW
v.
NEILSON.

During certain proceedings in error, the original plaintiff died, and his heirs, *Clark B., David H. and Elizabeth Lagow*, were made plaintiffs in his stead. After this, on the 25th of *November, 1855*, *Peter A. Springman* and *Eliza M. Shaw*, who claimed as tenants in common with the heirs of *Wilson Lagow*, were, by order of the Court, made new parties; and thereupon they, the said heirs, with the said *Springman* and *Shaw*, filed an amended complaint. At the *December* term, 1856, the defendant answered, 1. By a special denial. 2. By a general denial. 3. That the cause of action did not accrue to the plaintiffs within twenty years next preceding the institution of this suit. 4. That the defendant has been in the peaceable, adverse possession more than twenty years next before this action was brought. 5. That as to *Eliza M. Shaw*, the cause of action did not accrue within twenty years next before the commencement of this suit, by the filing of the amended complaint herein; nor did she commence the suit within two years after the death of *Henry M. Shaw*, her husband. 6. That *Shaw* and *Springman* are not entitled to prosecute jointly with the heirs of *Wilson Lagow*, the original plaintiff, because the said *Wilson*, with others, by deed of general warranty dated *September* the 19th, 1821, and duly recorded, &c., conveyed the land for which this suit is brought to the *State Bank of Indiana*, under which the defendant claims title; and the defendant having filed said deed with his answer herein, and made the same a part thereof, avers that the heirs of *Wilson Lagow* are estopped from denying that deed, and the covenants and recitals therein contained; and that the pretended titles of *Shaw* and *Springman* would conflict with the deed to the bank, and impair the warranty, &c. 7. That *Peter A. Springman* departed this life before the commencement of this suit.

Plaintiffs replied to the third, fourth and seventh paragraphs, and demurred to the fifth and sixth; but their demurrers were overruled. To the reply to the fourth paragraph, there was a demurrer sustained. Issues of fact were ultimately made upon all the defences; and the Court having tried the cause, gave judgment for the defendant.

The record states that this appeal was taken from the decision of the Circuit Court upon questions of law which were reserved, and which relate to the pleadings in the cause. These questions will be noticed in the order in which they appear in the transcript.

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1858.

LAGOW
V.
NEILSON.

The causes of demurrer to the fifth and sixth paragraphs of the answer are thus stated: "Plaintiffs demur to the fifth paragraph, 1. Because, they say, it is not material when said amendment was filed; and 2. Because the plea of the statute of limitations relates to the commencement of the suit, and not to the filing of the amendment. And as to the sixth paragraph, the said *Shaw* and *Springman*, having inspected the deed, &c., demur and say that neither of them, nor those under whom they claim, are a party or parties to said deed, or bound by the covenants therein.

The appellee contends that the causes assigned are not within the statute, and the demurrers, for that reason, were correctly overruled. We think differently. The assignments, it is true, are not in any approved form; still they designate with a sufficient degree of certainty the alleged defects in the pleadings to which they relate. We are referred to *Lane v. The State*, 7 Ind. R. 427, but that case is not in point. There, the demurrer was held defective because it was general, and addressed to three paragraphs collectively, without any particular specification as to the defects of either.

The next inquiry is, whether the statute of limitations, set up in the fifth paragraph, is an available bar to the action, as against *Eliza M. Shaw*. Generally speaking, an amendment to a complaint has relation to the time the complaint was filed; but this never occurs when such amendment sets up a title not previously asserted, and which involves the question of the statute of limitations. *Miller v. McIntire*, 1 McLean, 85.—*Same Case*, 6 Pet. 62. Here, the new parties introduced by the amendment are alleged to be tenants in common with the original plaintiffs. Consequently, they do set up a title not before asserted; because, in the language of the books, "tenants in common are such as hold by several and distinct titles,

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1858.

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v.
NEILSON.

but by unity of possession." 1 Bouv. Law Dic. 574. We are of opinion that as to the new parties, the statute continued to run until the amendment was made.

The sixth paragraph assumes that, as the heirs of *Wilson Lagow* are estopped by his deed to the bank, *Shaw* and *Springman* were not entitled to join in the action. This conclusion seems to be incorrect. By such estoppel, their right of action could not be affected; because the code, in reference to actions for the recovery of real estate, expressly says that "one or more of the plaintiffs may recover the premises, or any part thereof, or any interest therein, or damages, according to the rights of the parties." 2 R. S. p. 167, § 600. Their demurrer to this defense should have been sustained; because it fails to aver that they, or those under whom they claim, are parties to the deed. Without such averment, that deed cannot, as to them, be held an estoppel.

The reply to the third paragraph of the answer is as follows: "Plaintiffs say that for twenty years next before the commencement of this suit, *Neilson*, the defendant, was a non-resident of this state." To this reply the Court sustained a demurrer. And the question to settle is, does the reply avoid the defense of the statute of limitations?

Section 216 of that statute, declares that "the time during which the defendant is a non-resident of the state, or absent on public business, shall not be computed in any of the periods of limitation. But when the cause has been fully barred by the laws of the place where the defendant has resided, such bar shall be the same defense here, as though it had arisen within this state." 2 R. S. p. 77.

It is insisted that this section was intended to apply to personal actions, and not to those instituted for the recovery of real property. We are not inclined to adopt that construction. As contended, the concluding branch of the section should not be so construed as to allow the law of limitation of a sister state to be used here in regard to actions for the realty; and it may be that, for the recovery of real estate, a party is never prevented from bringing his suit, by the non-residency of any claimant or owner; still

these conclusions, not being inconstant with the very explicit language used in the first branch of the enactment, cannot be allowed to control it. The phrase "shall not be computed in any of the periods of limitation," evidently refers to all the periods of limitation definitely fixed by the statute: hence, there seems to be no room left for construction. The demurrer was not well taken.

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1858.

THE NEW AL-
BANY, & C.,
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V.
FIELDS.

The appellee insists that the judgment should be affirmed, though some of the demurrers were incorrectly decided; that the merits of the whole case were passed on by the Court sitting as a jury, and its finding should, therefore, be allowed to stand. The answer to this is, that the cause is before us as a reserved case, and we are not allowed to look beyond the questions of law reserved in the Circuit Court.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. Judah, for the appellants.

A. P. Hovey, A. T. Ellis and N. Usher, for the appellee.

THE NEW ALBANY AND SALEM RAILROAD COMPANY *v.*
FIELDS.

A stipulation in an agreement to subscribe for shares in the capital stock of a corporation to the effect that the installments, when collected, are to be applied in a certain way, constitutes no condition to their payment. The stock itself, is the only consideration of the agreement, and the subscription is absolute.

In a suit upon such an agreement, an answer setting up a contemporaneous verbal agreement varying its terms, is bad on demurrer.

Though a conditional subscription may be admitted, yet private arrangements, not expressed in the subscription, between an agent of a company and a subscriber, by which he is to have peculiar privileges not extended to other subscribers, or by which his subscription is not to be collected,—being made to induce others to subscribe,—are regarded as fraudulent on other subscribers, and are no defense to a suit for the amount subscribed.

A party is presumed to know the contents of an instrument which he signs, and has, therefore, no right to rely upon the statements of the other party as to its legal effect.

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1858.

THE NEW AL-
BANY, &C.,
RAILR'D Co.
V.
FIELDS.

Thursday,
May 27.

APPEAL from the *Morgan* Court of Common Pleas.

DAVISON, J.—This was an action by the railroad company against *Fields*, upon an agreement in writing. The agreement is as follows:

“We, the subscribers, agree to take the number of shares, of 50 dollars each, annexed to our names, in the capital stock of the *New Albany and Salem Railroad Company*, for the purpose of extending said road from *Gosport* to *Indianapolis*, by the river route, through *Mooreville*, and pay for the same in installments of three dollars and 33 and one-third cents per share every two months—the first installment to be due and payable on the first of *September*, 1851, and a similar installment every two months, until the whole is paid. *Rockingham*, May the 3d, 1851.

Subscribers' Names.	Number of Shares.	Amount.
<i>Henry Fields.</i>	One.	50 dollars.

The complaint avers that fifteen installments of the amount subscribed, making the aggregate sum of 50 dollars, are due and unpaid, &c., wherefore, &c.

The defendant's answer contains six paragraphs. Upon each of them, an issue of fact is taken; but as the evidence stated in the record applies mainly to the first and second, they alone will be noticed.

The first paragraph alleges that the plaintiffs had agreed to extend the *New Albany and Salem Railroad* from *Gosport* to *Indianapolis*, by the river route, through *Mooreville*, upon the condition that the citizens on the route would subscribe 100,000 dollars in the capital stock of the company, for the purpose aforesaid; and that when the contract sued on was executed, it was agreed that the same was not to bind the defendant, until he signed his name to the stock-books of the company; and further, that the agreement was not to be delivered to the plaintiffs, or be obligatory on the defendant, until the 100,000 dollars was subscribed. It is averred that the defendant has not signed his name to said stock-books, nor has the above amount been subscribed; but that the agreement was, without his consent, delivered to the plaintiffs, &c.

Second. At the time of the execution of the agreement,

one *James Matthews*, an agent of the plaintiffs, represented to the defendant that there would be a railroad meeting at the town of *Rockingham*, on the 5th of *May*, 1851; that *James Brooks*, the president of the company, would be present, and wanted all who intended to subscribe for stock for the purpose of extending the road, &c., to attend the meeting, where books would be opened for such subscription. That *Matthews* further represented that he wanted the defendant's name to the agreement, because it would induce others to subscribe, and if he would sign, his signature would not be binding, unless he attended said meeting and signed his name to the stock-books of the company; and that the defendant, relying upon said representations, which were false and fraudulent, and believing them to be true, did sign the agreement; but he avers that he did not attend the meeting, nor did he sign his name to the stock-books of the company, &c.

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To these paragraphs, the plaintiffs demurred; but their demurrers were overruled. The Court tried the issues, and found for the defendant; and having refused a new trial, rendered judgment, &c.

Do the facts stated in the defenses which we have noticed, bar the action? The solution of this inquiry decides the case.

It must be conceded that the purpose to which the installments, when collected, were to be applied, constitutes no condition to their payment. The entire consideration for the defendant's promise, was one share of the capital stock in the company; and it must be intended that he became a stockholder to that amount. Hence, the subscription before us, so far as it stipulates to pay, is absolute on its face. *The New Albany, &c., Railroad Co. v. Pickens*, 5 Ind. R. 247. And as the first defense sets up a contemporaneous verbal agreement varying the terms of the instrument in suit, we think the demurrer, as to that defense, should have been sustained. Indeed, this Court, upon a statement of facts in substance the same as those alleged in the defense, has often decided the point under consideration. 1 Blackf. 191, note.—5 *id.* 272.—7 *id.* 132.

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Nor is the second defense at all available. A late writer on railroad law, says: "Notwithstanding conditional subscriptions may be admitted, yet private arrangements, not expressed in the subscription, between the agent of the company and a subscriber, by which he is to have peculiar privileges not extended to other subscribers, or by which his subscription is not to be collected, being made to induce others to subscribe, are regarded as fraudulent on other subscribers, and not a defense to a suit for the amount subscribed." Pierce on Am. Railroad Law, 73, 74. This exposition, it seems to us, is strictly correct, and when applied to the case at bar, is decisive. The representations set up in the defense, as relied on by the defendant, are obviously nothing more than private arrangements between him and the company's agent.

But there is still another reason why the attempted defense should not be allowed to defeat the action. A party is presumed to know the contents of the instrument which he signs, and has, therefore, no right to rely upon the statements of the other party as to its legal effect. *Russell v. Branham*, 8 Blackf. 277.—*Starr v. Bennett*, 5 Hill, 303.—*Clem v. Newcastle, &c., Railroad Co.*, 9 Ind. R. 488. In this instance, the agreement is very explicit. It binds the defendant, unconditionally, to pay each installment at a stated period. Hence, the verbal statement of the agent, that the defendant's signature would not be binding unless he attended the meeting and signed his name to the stock-books, must be held a mere representation, as to the legal effect of the subscription; and though false, it could not deceive the defendant, because the agreement to which he then subscribed his name binds him absolutely to pay the installments. The judgment should be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. R. Harrison and J. W. Gordon, for the appellants.

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10	191
126	66

10	191
134	358

10	191
140	189

10	191
150	67

10	191
150	410

10	191
162	164

It seems that the husband of a sister of a decedent leaving issue, is not a competent juror in a suit brought by the widow.

In a suit to cancel a deed and for the recovery of real estate and damages for detaining it, one of the defendants, before the commencement of the trial, made oath that he had released his interest to his co-defendants, filing a quit claim deed as evidence of the fact, and moved that his name be stricken from the list of defendants. The Court overruled the motion. *Held*, that this was not error.

On the trial, his co-defendants, upon the same ground, offered him as a witness, but the Court excluded him. *Held*, that this was not error.

It was alleged in the complaint in this case, that the deed sought to be canceled was secretly made by the husband previous to his marriage with the plaintiff; and it was claimed that its execution was a fraud upon her marital rights. The defendants offered a witness to prove that a short time after the date of the deed the plaintiff was receiving witnesses' addresses as a suitor, and was under a promise of marriage with him. The Court refused the testimony as irrelevant. *Held*, that this was error.

The principle of the common law, by which the husband was entitled to receive the property of the wife to aid him in paying her debts contracted before coverture and in supporting her during its existence, does not apply in a case by the wife against the husband.

Generally, the owner of property has a right to dispose of it to whom he pleases; but the right must be exercised without fraud.

Thus, if a man or woman represent to the other, as an inducement to marriage, that he or she is the owner of certain property, and the marriage, in part upon such consideration, should be consummated, a secret voluntary conveyance of such property before the marriage, by one of the parties, would, *it seems*, be a fraud upon the other.

But evidence that the property was conveyed before the parties contemplated marriage, would tend to repel the inference of fraud.

What constitutes the delivery of a deed is much a question for the jury in each case. A deed may be delivered by words without actions; or by actions without words; or without being actually handed over. Once delivered, its detention by the grantor subsequently, does not divest the title of the grantee. But *it seems*, that, to be delivered, the deed must pass under the power of the grantee, or some person for his use, with the consent of the grantor.

APPEAL from the *Fayette* Circuit Court.

PERKINS, J.—Complaint to obtain the cancellation of a deed, and to recover real estate.

The complaint states that the plaintiff, *Matilda Dearmond*, was, on the 18th of *November*, 1852, the widow of a former husband, then deceased, and the mother of then living children, begotten by said deceased husband; that

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William L. Dearmond was then a widower, the father of living children begotten upon the body of a former wife, then deceased; that on said day, the said *Matilda* and the said *William L.* intermarried; that they lived together, as husband and wife, till the 18th *December*, 1853, when said *William L.* suddenly died, leaving the said *Matilda* pregnant with a child which was afterwards born alive, and named *William R. L. Dearmond*; that before the intermarriage of the said *Matilda* and the said *William L.*, the latter secretly signed and acknowledged a deed of his real estate to his son, *William Dearmond*, but kept the same in his possession till his death, after which, the said *William*, by stealth, obtained possession of it, &c. She claims that the deed was a fraud upon her marital rights. The complaint was filed against all the children and heirs of her deceased husband by the first wife.

Answer in general denial.

Trial by jury. Judgment for the plaintiff.

One of the errors assigned is the overruling of a challenge for cause to a juror.

Rice Robinson, on examination, stated that the plaintiff's first husband was a brother of his wife; that his, and the plaintiff's children by that husband, were first cousins.

It would seem, from the case of *Trullinger v. Webb*, 3 Ind. R. 198, that the challenge to the juror should have been sustained. Had this plaintiff instituted a suit for any cause while her husband was living, *Robinson* would certainly have been an incompetent juror in such suit; and, as issue was left surviving by that husband, it would seem that the incompetency continued to exist. 2 R. S. p. 340.

Before the commencement of the trial, *William Dearmond*, one of the defendants, made oath that he had no interest in the suit; that he had released all his right and title in the subject-matter in controversy to his co-defendants, and filed a quit claim deed to them, as evidence of the fact, which deed was executed *June 25*, 1855. He moved that his name be stricken from the list of defendants. The Court overruled the motion.

Where there are several defendants in an action of tort,

the Court, at any time, when it fully appears by the evidence that one or more of said defendants cannot have a judgment rendered against them, will order them discharged. So, the Court may, by statute, at any stage of all civil suits, permit the names of improper or unnecessary parties to be stricken out. 2 R. S. p. 48, § 99. But, in this case, as the plaintiff was suing not only for the land, but also for damages for its detention, perhaps this defendant might be liable in respect to such as might have accrued before he released; and, if so, the Court did right in refusing to permit his name to be stricken out. The Court had a discretion on this point.

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On the trial, his co-defendants, upon the same ground that said *William* had moved that his name be stricken from the list of defendants, viz., want of interest in the suit, offered him as a witness in their behalf to prove that their father made the deed sought by the plaintiff to be set aside, or the contract for it, long before he contemplated marriage with the plaintiff; that he made it for a valuable consideration, and in good faith, and actually delivered it. The Court refused to hear him testify.

The facts proposed to be proved by the witness were pertinent to the case, and might have had a material bearing upon it, as may be seen in what will be subsequently said; yet, as he was a party to the record, and, as we have seen, might be subjected to a joint judgment, as to part of the subject-matter of the suit, we cannot say he was erroneously excluded as a witness. *Wood v. Cohen*, 6 Ind. R. 455.

The defendants offered to prove by one *Beaver* that up to, and for a short time after, the date of the deed claimed by the plaintiff as fraudulent, the plaintiff was receiving his, *Beaver's*, addresses as a suitor, and was under promise of marriage with him. The Court refused the testimony as irrelevant. We think the Court erred in the refusal.

The questions arising in this case for trial were two—

1. Was the deed in question delivered to the grantee?
2. Was it fraudulent as to the plaintiff in this suit?

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himself, 200 dollars to the plaintiff, 100 dollars to said *Elizabeth Mahen*, and 60 dollars to one *Euphemia Mahen*; that said plaintiff, her husband, assented to the disposition; that said *Elizabeth* accepted the notes upon the conditions specified; that about two days thereafter, said *Mary* departed this life, but that said *Elizabeth* failed to fulfill her trust, and surrendered the notes to the plaintiff, late said *Mary's* husband.

Reply in denial.

Trial. Judgment for the plaintiff.

The evidence is upon the record. It shows the delivery of the notes to *Elizabeth*, the death of *Mary*, and the subsequent surrender of the notes to the plaintiff. It does not show when the parties were married, when, or from what source, the moneys for which the notes were given, came to the payee thereof, *Mary*, nor the relationship, except as to the plaintiff, of those to whom the proceeds were to be distributed, though the notes appear to have been her separate property. As to the consent of the plaintiff, husband of *Mary*, to the arrangement, we cannot, in view of the finding of the jury, regard it as having been given, though it appears that, owing to her dying state, he declined to disturb her, saying to her not to mind about him, he could get along some how, to die in peace.

We shall waive the question whether, conceding the power in the donor, the facts show that a valid delivery of the notes, as a *donatio mortis causa*, was made. See this point examined in Williams on Personal Property, 2d Am. ed. p. 355.

We shall consider the question of power.

At common law, coverture disabled the wife to convey her property, real or personal, without the consent of her husband (2 Kent, 129 to 150), unless by virtue of some trust or power of appointment. Williams on Personal Property, top p. 409, *et seq.* See *Grimke v. The Executors of Grimke*, 1 Desaussure, 366. Our later statutes have made many changes in the relation and powers of husband and wife, the precise extent of which is not easily determined, and must depend, therefore, much upon construc-

tion. This construction must be the work of the Courts; and in performing it, they should keep a steady eye to the intention with which the legislature enacted the statutes, if it is possible to discover that intention.

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Judge GOOKINS, himself a leading member of the body that enacted our present code, in *McCarty v. Mewhinney*, 8 Ind. R. 513, says:

“The object of these innovations seems to have been to destroy the community of interest between husband and wife, as far as possible—rendering it less identical than in an ordinary partnership.”

We are unwilling, without the clearest evidences, to concur in this opinion. When we consider the infinite importance in its bearing upon the welfare of families, and of society, and upon the public morals, of family unity and harmony, and the baleful influence of legislation calculated to disorganize that unity, destroy that harmony, by dividing families, houses, against themselves that they cannot stand, it will induce us to be slow in attributing such a design to our legislators. We rather conclude that the object was, to secure to married women, during their lives, who might unfortunately have spendthrift husbands, such means of support as they might possess, for themselves and families. This would be an object worthy the legislature, and in accordance with the dictates of reason and justice.

Guided by this idea, and a well settled legal principle that statutes in derogation of the common law must be strictly construed, we proceed to ascertain the meaning of the statutes enlarging the rights and increasing the powers of married women touching property.

1. Can they dispose of their separate property by will?

Our statute of wills does not expressly except married women from its operation (2 R. S. p. 308); but the weight of authority seems to be, that a general statute giving power to make wills, will not be construed to embrace persons under common law disabilities. 1 Jarman on Wills, top p. 35.—4 Kent, 505. And that such was the view of our legislature, seems strongly implied by § 16, 1 R. S. p. 504, which enacts that “A general and beneficial power

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may be given to a married woman, to dispose of or devise, without the concurrence of her husband, lands conveyed or devised to her in fee." Such was the common law. But this point we will now neither decide nor discuss, as it is not material in the present case. It is not put upon the ground of a will. See *Wentworth on Executors*, ed. by *Ingraham*, p. 362.

2. Can married women dispose of their property by a conveyance?

Section 5, 1 R. S. p. 321, enacts that—"No lands of any married woman, shall be liable for the debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she was unmarried; *provided* that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join."

This section does not authorize the conveyance of the estate, but forbids it. The wife, then, cannot dispose of her real estate without the consent of her husband. The provision quoted, we may remark, in passing, would not authorize a disposition by will. *Beach v. Manchester*, 2 Cush. (Mass.) 72.

Touching her personal estate, it is enacted by § 5, p. 57, Acts of 1853, that—

"The personal property of the wife held by her at the time of her marriage, or acquired during coverture by descent, devise or gift, shall remain her own property to the same extent, and under the same rules, as her real estate so remains; and on the death of the husband before the wife, such personal property shall go to the wife, and on the death of the wife before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances."

As she cannot convey her real estate without the consent of her husband, and holds her personal with the same extent of right as she does her real, it would seem to follow that the wife was not empowered by the statute to dispose of her personal property without the consent of her husband. See *The Junction, &c. Co. v. Harris*, 9 Ind. R. 184. That

she can retain the possession of her personal, and the income of her real estate, and the use of both, as exempt from sale for her husband's debts, and as exempt from his power to appropriate them for that purpose, would seem to be clear; but that she cannot convey them away to others, without his consent, during coverture, seems equally clear. Upon the questions of the husband's consent, and of any ante-nuptial agreement, in this case, we cannot interfere with the finding below. From what has been said, it follows that the attempted disposal of the notes in question was invalid; that they remained the property of the wife at her death, going to her administrator to be collected, and the proceeds appropriated, according to the direction of the statute.

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Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

D. Moss and *W. Garver*, for the appellant.

G. H. Voss, for the appellee.

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The Court may permit the parties to perfect their pleadings, at any time, upon the issues formed before the submission of the case to the jury; but it cannot permit a party to amend so as to present a new issue after the evidence and the argument have been heard.

Quære, whether the Court should permit a reformation of the whole pleadings, at any time, upon cause shown.

In cases where, under the former practice, general assumpsit might be brought where there had been a special contract, an action may now be brought upon the implied legal engagement or obligation of the defendant to pay for the services or thing ordered or received by him, without reference to the special contract.

If the defendant, in such case, would avail himself of the special contract, either to defeat the action or to fix the measure of damages, he must plead it, and produce it in evidence.

But if, in such a proceeding, the existence of a special contract is developed by the evidence, the plaintiff must show its stipulations, and that he has

10	199
145	317
10	199
158	481
158	482
158	484
10	199
159	495
10	199
163	532
163	533

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complied with them on his part, or that he has been prevented from doing so; and he must make it appear that he is in a condition to recover without regard to it.

APPEAL from the *Elkhart* Court of Common Pleas.

HANNA, J.—*Raymond* sued *Kerstetter*, and alleged that the defendant was indebted to him in the sum of 981 dollars, for personal property sold and delivered to defendant, the particulars of which are set forth in an account filed.

The account referred to, a copy of which is attached to the complaint, was for a certain number of pounds of live hogs and cattle at fixed prices per hundred pounds.

The answer to the complaint was in two paragraphs—first, a denial; secondly, that the property was “purchased for and sold to *A. Brown & Co.*, for whom defendant was agent.”

Upon the trial, after the evidence was closed, and the case had been argued to the jury, the plaintiff asked and obtained leave, over the objection of the defendant, to file an additional paragraph to his complaint. The paragraph was upon a written contract, and sets forth the terms but not a copy of such contract. The defendant then asked time to prepare an affidavit for a continuance, on the ground of surprise. He then moved to strike out the additional paragraph. He then offered to file a demurrer to the same; each of which motions was overruled by the Court. On leave, the defendant thereupon filed an answer, specially denying that he made a written contract as alleged, which answer is sworn to.

The Court then, over the objection of the defendant, instructed the jury.

Before the jury retired, the plaintiff asked leave to amend the additional paragraph of his complaint by adding these words: “A copy of which said contract the plaintiff is not able to give, by reason of its being in possession of the adverse party.” The defendant objected. The amendment was filed. No evidence was given by either party after these pleadings were filed.

Did the Court err in thus permitting amendments, as they are called in the record?

Several provisions of our statute are referred to.

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“The Court may at any time, in its discretion, and upon such terms as may be deemed proper for the furtherance of justice, direct the name of any party to be added or struck out; a mistake in name, description, or legal effect, or in any other respect, to be corrected; any material allegation to be inserted, struck out or modified to conform the pleadings to the facts proved; when the amendment does not substantially change the claim or defense.” 2 R. S. p. 48, § 99.

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“Any pleading may be amended by either party, of course, at any time before the pleading is answered.” *Id.* § 97. And again, “No cause shall be delayed by reason of an amendment, excepting only the time to make up issues, but upon good cause shown by affidavit of the party or his agent asking the leave.” *Ibid.*

In the case of *Ostrander v. Clark*, 8 Ind. R. 211, it is decided that the jury should be sworn after the issues are completed. In the case at bar, the additional paragraph and answer referred to, made an issue not formed by the original pleadings, nor was it similar to those then formed. The jury had been impaneled and sworn before that issue was made, and could not, therefore, under that impanelling and swearing, properly try the same. Section 212, 2 R. S. p. 107 provides that—

“Before the commencement of the trial, an oath must be administered to each juror that he will well and truly try the matter in issue between the parties,” &c.

This would appear to involve the necessity of closing the issues that are intended to be submitted to the jury, before they are sworn. *Ostrander v. Clark*, 8 Ind. R. 211. The amendment of the pleadings, so as fairly to present to the jury the issues they are sworn to try, is manifestly very different from the formation of a new issue, by filing additional pleadings, during the progress of the trial. Without doubt the Court would have the power under the statute, upon a proper case made, to permit the parties to perfect the pleadings, at any time, upon the issues made before the submission to the jury, and then complete the trial.

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But we think it could not permit a party to present, as a matter of course, a new issue for trial, at the stage of a case in which these amendments, as they are termed, were filed. *Shank v. Fleming*, 9 Ind. R. 189. Whether the Court should permit a reformation of the whole pleadings, at any time, upon cause shown, and what would be the effect of thus reforming the pleadings, are questions not now before us.

The new pleading having been improperly filed, the next question is as to its effect.

The parties appear to have acted, in this case, upon the presumption that it is obligatory upon one who resorts to a suit, to seek his remedy upon the written contract or agreement, where one exists, in reference to the subject-matter embraced in the controversy. This is evident from the fact that, after the evidence disclosed the existence of a written contract, the plaintiff sought and obtained leave to file the additional paragraph to his complaint, and from the further fact that the defendant asked certain instructions to the jury, directed to that point. Should the written contract have been made the foundation of the suit? A copy of it is not given. The paragraph professes to set forth its terms and stipulations. No proof was given as to its terms, &c.

There could be no doubt, from the evidence, about the plaintiff having parted with his property on some kind of contract, either express or implied, with defendant. The evidence is conflicting as to whether the defendant was acting for himself or for others, in making the purchase. It was a question for the jury.

Several instances are given in which general assumpsit might be brought, under the old form of pleading, where there has been a special contract—the following among others:

1. "Where the whole of such contract has been executed on the part of the plaintiff, and the time of payment on the other side is past, a suit may be brought on the special contract, or a general assumpsit may be maintained; and in the last case, the measure of damages will be the rate

of recompense fixed by the special contract." 2 Smith's Leading Cases, 41.—*Bank of Columbia v. Patterson's Admr.*, 7 Cranch, 299, 2 Curtis, 540.—1 Bacon's Abr. 380.—*Chesapeake and Ohio Canal Co. v. Knapp*, 9 Pet. 541, 11 Curtis, 476. May Term,
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2. "If there has been a special contract which has been altered or deviated from in particulars, by common consent, general assumpsit will lie," &c. 2 Smith's Leading Cases, p. 42.—*Dubois v. The Delaware and Hudson Canal Co.*, 4 Wend. 285.—*Jones v. Woodbury*, 11 B. Mon. 169.

3. "If there has been a special contract, and the plaintiff has performed a part of it according to its terms, and been prevented by the act or consent of the defendant, or by the act of the law, from performing the residue, he may in general assumpsit recover compensation for the work actually performed, and the defendant cannot set up the special contract to defeat him." 2 Smith's Leading Cases, p. 43, and cases cited.—*Scobey v. Ross*, 5 Ind. R. 446.

4. Under the decisions in this state, the following principle is also established, to-wit: "That when one party to a special entire contract has not complied with its terms, but professing to act under it, has done for, or delivered to, the other party something of value to him which he has accepted," &c., and the time for performance of the contract is past, an implied promise arises to the extent of the value, &c. *Lomax v. Bailey*, 7 Blackf. 603.—3 Ind. R. 73.

This being the law previous to the adoption of our new code of procedure, the question presents itself, as to whether that has changed it. We have not been able to find any statute directly in point. We are referred to 2 R. S. p. 44, § 78, where it is said that—"when any pleading is founded on a written instrument, or on account, the original or a copy thereof must be filed with the pleadings," &c. This, it is insisted, makes it the duty of a party seeking to recover for the breach of a contract so reduced to writing, to sue upon the special contract, and file the original or a copy thereof; and it is contended that this is manifest from the use of the language, "the original or a copy thereof, must be filed with the pleadings." This would be

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the proper construction, if the former part of the sentence had provided that, when suit was brought upon a contract which had been reduced to writing, then that such filing should take place. But the language used is, when well considered, entirely different. The pleading must be founded upon the written instrument, to entitle the opposite party to the original or a copy. And we have already referred to instances in which it is not necessary that the suit should be founded upon the special contract, although one might have existed. In such cases, the plaintiff proceeds exclusively upon the implied legal engagement or obligation of the defendant, to pay the value of the services or thing ordered or received by him; nor does the plaintiff legally ground his claim at all upon the special contract, nor derive any right from it, nor make it any part of his case. We think, if our law-makers had intended to change these rules, which have been settled by much litigation, they would have expressed such intention in a direct manner, and would not have left it to be implied.

If the defendant, in the case at bar, had desired to avail himself of any supposed benefit to him, arising out of the written contract, either to defeat the action, or to fix the measure of damages, he could have done so by pleading it in answer and producing it in evidence upon the trial. The mere filing the additional paragraph, without receiving evidence to sustain it, could not have produced any injury to the defendant.

The last error assigned—that the verdict is not sustained by the evidence—we think is well taken. In the absence of evidence that the parties had entered into a special written contract concerning the matters in controversy, the plaintiff had, by the testimony introduced, so far made out a case as to leave it a question for the jury whether he had a right to recover; but after there was evidence given that such written contract existed, the plaintiff did not attempt to show what its stipulations were, or that he had complied upon his part, or been prevented from complying; nor did he show that, for any reason, he was in a condition to disregard the written contract, and recover for the property

delivered; nor was it given in evidence or its contents proved by the defendant. It is insisted that, evidence upon this point should come from the defendant under these circumstances. We think not. Suppose it was true that the plaintiff had complied with all the stipulations upon his part; still he would have to produce the contract to show that the day of payment had arrived, and that the defendant was in default; so if the special contract had been departed from by mutual consent, or if the plaintiff had been prevented from performing, &c., or if the time for the performance of the contract was past and it was no longer open. There was no evidence upon any of these points. *Epperly v. Bailey*, 3 Ind. R. 73.—*Wheatly v. Miscal*, 5 id. 142.—*Lomax v. Bailey*, 7 Blackf. 599.

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v.
ELLSWORTH.

A late writer on evidence holds the following language: "Where in a suit for the price of work and labor performed, it appears that work was commenced under an agreement in writing, the agreement must be produced; and even if the claim be for extra work, the plaintiff must still produce the written agreement; for it may furnish evidence, not only that the work was over and beyond the original contract, but also of the rate at which it was to be paid for. 1 Greenl. § 87.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Liston, T. G. Harris, J. W. Gordon and ——— *Davis*, for the appellant.

R. Lowry, for the appellee.

SWIFT and Another v. ELLSWORTH.

10	205
148	115

In a suit brought by the assignee to foreclose a mortgage executed to secure the payment of a promissory note, a paragraph of the answer admitting the assignment by denying that the assignee is the real party in interest, but alleging no facts which would enable the Court so to decide, is bad on demurrer.

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As was formerly the rule in equity, so by our statute, the real party in interest must bring the action, except where the statute has otherwise provided; and in a suit by the assignee of a promissory note, an answer showing affirmatively that the plaintiff is not the real party in interest, and that he is not authorized to sue by any of the statutory exceptions, is good.

Where a demurrer to a pleading has been sustained, the refusal of a continuance to enable the party filing it to obtain answers to interrogatories framed to elicit evidence to sustain his pleading, is not error.

Though a party in his complaint name himself plaintiff, and other persons defendants, it does not follow that all the defendants named will necessarily continue their adverse relation to him throughout the action, and if one of such defendants, being a proper party to the action, cease, in the progress of the pleading, to be adverse to the plaintiff, such defendant cannot be examined as a witness on the plaintiff's behalf.

If in a suit by the assignee of a promissory note against the maker, the payee be joined as a defendant, and he fail to demur or answer, and afterwards file a pleading, in the nature of a reply to the answer of his co-defendant, and the issues formed were such as to enable the Court to determine how much the assignee was entitled to recover from the maker, and what deductions the maker was entitled to for payments made severally to the payee or the assignee, and thus the amount for which the payee would be responsible,—such payee is a proper party to the action.

Thursday,
May 27.

APPEAL from the *Benton* Circuit Court.

HANNA, J.—This was an action by *Ellsworth*, assignee of *Rowe*, against *Swift* and *Rowe*, on a promissory note, made by *Swift* to *Rowe*, and to foreclose a mortgage, &c., for 4,780 dollars.

Rowe filed no answer. *Swift* answered in four paragraphs, setting up, 1. Matters of set-off between himself and *Rowe*, and also certain counter-claims for damages by way of recoupment. 2. Part payment to *Rowe*. 3. That *Ellsworth* was not the real party in interest, but that the note, &c., was the exclusive property of *Rowe*. 4. As follows: "That said note was assigned by the defendant, *Rowe*, to the plaintiff, by indorsement in blank, as alleged; that it was so assigned and delivered to the plaintiff by *Rowe*, to secure to said plaintiff 2,500 dollars which *Rowe* owed plaintiff, and for no other consideration; that after said assignment and delivery, the defendant, *Swift*, paid to the plaintiff the said sum of 2,500 dollars, in full, being all the interest of the said *Ellsworth* in said note, and that since said payment the said plaintiff has not acquired any interest in the residue of said note; that the said pay-

ment is credited on the note, and that the plaintiff is not the real party in interest in this suit, but that the said defendant, *Rowe*, is the exclusive owner of said note.”

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The affidavit of the agent of *Swift* was filed as to the truth of this fourth paragraph, and as to the materiality, &c., of an answer to the interrogatories therewith filed.

Separate denials were filed by *Rowe* and *Ellsworth* to the first and second paragraphs of the answer of *Swift*, forming issues of fact; and to the third and fourth paragraphs *Ellsworth* demurred. The demurrer was sustained. Trial on the issues of fact. Finding and judgment for *Ellsworth* against *Swift* for 2,034 dollars and 4 cents. *Swift* appeals.

The interrogatories filed with the fourth paragraph were intended to elicit evidence to support the allegations of said answer. After the demurrer was sustained to the fourth paragraph, the Court refused to continue the cause for an answer to said interrogatories.

Three questions are presented—

First. As to the sufficiency of the third and fourth paragraphs of the answer.

The third paragraph is clearly bad. *Lamson v. Falls*, 6 Ind. R. 311. That was a suit similar to this, and the answer was the same as this third paragraph. It is there said that “The defect in the paragraph in question is, that, in effect, it admits the assignment of the note and mortgage, but does not contain such a state of facts as would enable the Court, in view of the assignment, to say, as matter of law, that *Falls* is not the real party in interest.” The third paragraph in this case is open to the same objection.

The fourth paragraph is framed with a view to avoid that objection, by setting out the facts specifically, and causing the truth thereof to be verified by affidavit. The appellees insist that, even if this fourth paragraph shows facts sufficient to enable the Court to say that *Ellsworth* was not the real party in interest, yet, under the statute, he was, as the holder of the note by assignment, entitled to maintain the action in his own name. That statute is

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as follows: Section 1. "That all promissory notes, &c., shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorser successively." Section 2. "The assignee of any such instrument may, in his own name, recover against the person who made the same." 1 R. S. p. 378.

This statute makes the assignee, for the purpose of suing, the legal holder of the instrument, unless a state of facts may be shown to deprive him of that right, under § 3, 2 R. S. p. 27, which is as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." The provision of the next section is as follows: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted."

Is the assignee of a promissory note, who may hold it as such, without any real interest, one of that class of persons here referred to as being "expressly authorized by statute" to sue? or does the provision have reference to another class of persons, such as the guardian of an idiot, &c.?

We are of opinion the clause of this section above quoted, does not have reference to the rights of an assignee of a promissory note, but to such persons as may be authorized to sue in their own names, because of holding some official place; as the president of a bank, under the general law (1 R. S. p. 157), or as the trustee of a civil township (*Id.* 467), &c. It therefore follows, that the real party in interest, as was formerly the rule in equity, must bring the action, subject to the provisions and exceptions of the statute; and that if any other than those thus authorized should bring suit as plaintiff, an answer showing affirmatively the facts, is a good answer. We think the fourth paragraph of this answer was sufficient. Van Santvoord's Pl. 109, 421, 478.

The next question arises upon the refusal of the Court to continue the cause for an answer to the interrogatories filed with the answer of the defendant, *Swift*. They were pertinent and relevant to the issues tendered by the third

and fourth paragraphs of the answer. A demurrer having been sustained to those paragraphs, a refusal to continue for an answer to the interrogatories, was, under that ruling, correct, for the reason that responsive answers to those questions could not have been properly admitted as evidence under either of the other issues. But as the fourth paragraph was sufficient, the demurrer ought to have been overruled as to it, and the cause continued, if necessary, to obtain an answer to the interrogatories.

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The third point raised, is upon the ruling of the Court in admitting, on motion of the plaintiff, *Rowe*, one of the defendants, as a witness. *Rowe* had filed no answer. His co-defendant, *Swift*, had, which involved the right of *Swift* to have certain deductions from the note sued on, because of claims for damages and payments by him, held against *Rowe* as assignor.

The interest of *Rowe* was certainly adverse to that of *Swift*, under the issues of fact found and submitted for trial, and was not adverse to that of *Ellsworth*, within the meaning of the statute, for their replies to the answer of *Swift* are similar. Whatever evidence was introduced, under the issues, was directed to the liability of *Rowe* for damages and payments; and although the same was intended to lessen the amount to be recovered by the plaintiff from the defendant, *Swift*, yet it might, in the same suit, if *Rowe* was a proper party, authorize the plaintiff to recover against *Rowe* such sum as should be thus deducted, in consequence of his liability to *Swift*. The statute, which it is insisted authorized the introduction of the testimony of *Rowe*, is as follows: "A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as other witnesses, to testify, either at the trial, or conditionally, or upon commission." 2 R. S. p. 96, § 295. Now, it is clear that, as to the matters put in issue by the pleadings, the real controversy was between the two defendants; and the plaintiff stood ready to take his judgment against *Swift* for the

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whole amount due on the note, or for the amount less all just sums deducted for payments to *Rowe*, or legal liabilities by him incurred before the maker had notice of the assignment. The true construction of this statute arises upon the adverse interest, as shown by the proceedings in the case, at the time the offer was made; and it does not follow that because one person may in his complaint name himself plaintiff, and several others defendants, that, therefore, all those others shall continue, necessarily, to be adversary parties to him during the whole progress of the case. But it is insisted that he was not a necessary party to the suit, and, therefore, although he might have been interested, the plaintiff was entitled to his testimony. Under the 2 R. S. p. 80, § 238, whatever might have been the rule as to his admissibility as a witness upon the issues made, if he had not been a party to the record, it is not necessary to decide, if he is a proper party. The statute under which it is argued that he is a proper party is the following:

“The holder of any note or bill of exchange, negotiable by the law merchant, or by law of this state, may institute one suit against the whole, or any number of the parties liable to such holder,” &c. 1 R. S. p. 379, § 16.

By the first section of the same act, promissory notes are negotiable by indorsement thereon. But is there such a liability to the holder as makes the indorser a proper party defendant in a suit against the maker? The fourth section of the same act provides that “any such assignee, having used due diligence in the premises, shall have his action against his immediate or any remote indorser.” The question, then, is, when is the liability of the assignor to the assignee complete, so as to authorize a suit? Does it attach upon the failure of the maker to pay, or not until suit shall have been resorted to, as to the maker?

In the case at bar, it will be recollected that *Rowe* did not answer the complaint, nor did he demur because he was improperly joined. His co-defendant could not make the objection for him. 2 Barb. Ch. 106.—*Id.* 618.—8 How. Pr. R. 392.

Thus we have, then, a case where the holder of a note,

of his own volition, has made the maker, and the payee thereof, defendants. The payee, who is the immediate assignor of the plaintiff, in like manner voluntarily submitted to be made a defendant, by failing to demur to the complaint, and thus testing the question of whether it contained facts and averments sufficient to make him a party defendant. But the further pleadings in the case, the answer of his co-defendant, and what is called his reply to that answer, show that he was then a proper party, under the sections of the statute already referred to when construed in connection with § 22, 2 R. S. p. 32, and § 368, *id.* p. 121. Section 22 gives the Court the power "to determine any controversy between the parties before it," &c.; and § 368 gives power to "determine the ultimate rights of the parties on each side, as between themselves;" in the rendition of the judgment. For instance, in the case at bar, the maker of the note, the payee (who had become the assignor thereof), and the holder, were all before the Court. The issues formed were such as to enable the Court to determine how much the holder or assignee was entitled to recover of the maker—what deductions the maker was entitled to for payments, &c., to the assignee, and to the assignor—and thus the amount that the assignor would be ultimately responsible for to the assignee.

All that we determine upon this point is, that, under the peculiar circumstances of this case, the pleadings and facts in the progress of the cause, made *Rowe* a proper party, before he was offered as a witness, and, upon the issues formed, incompetent to testify.

We do not decide what would be, primarily, a sufficient complaint to make the payee a defendant, together with the payor, where such payee should choose to test the question. That point is not before us.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. A. Huff, Z. Baird and J. M. La Rue, for the appellants.

R. C. Gregory, H. W. Chase and J. A. Wilstach, for the appellee.

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1858.

SWIFT
v.
ELLSWORTH.

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1858.

LAIRD *v.* EICHOLD and Another.

LAIRD
v.
EICHOLD.

○

An innkeeper is only *prima facie* liable for loss or damage to goods of his guest, while in his possession; and he may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants for whom he is responsible.

Friday,
May 28.

APPEAL from the *Carroll* Court of Common Pleas.

WORDEN, J.—This was an action by the appellees against the appellant, to recover damages for an injury done to a certain mare, placed by the appellees, as guests, in the custody of the appellant as an innkeeper.

The cause was tried by a jury, and there was a finding and judgment for the plaintiffs below. New trial refused, and exceptions taken.

On the trial, the Court gave the jury the following instruction, which was excepted to, viz.:

“*Laird*, as innkeeper, is liable to his guest for all injuries done to property delivered to him by his guest, while in his possession, if such injury resulted from any cause not the act of Providence, or the public enemies.”

This charge is modified by another one, given by the Court, so as to exclude the idea of liability for a loss or injury growing out of the fault of the guest.

The charge, as thus qualified, assumes that an innkeeper is responsible for all injuries not caused by the act of Providence, the public enemies, or the fault of the guest, whether the injury result from the carelessness and negligence of the innkeeper, or happen notwithstanding he may have exercised the utmost care and diligence.

On the subject of the liability of innkeepers, the books are not free from discrepancies, and there is some conflict in the decisions. In 2 Kent's Com. 592, it is said that “they are held responsible to as strict and severe an extent as common carriers.” In *Hill v. Owen*, 5 Blackf. 323, this point was left open, but it was determined in the case that the death of the horse, while in the possession of the innkeeper, was *prima facie* evidence of negligence on his part, sufficient to charge him, unless he could exculpate himself

by showing due care. Although it is not decided, yet the implication is strong that such showing would exonerate him.

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1858.

LAIRD
v.
EICHOLD.

In *Thickstun v. Howard*, 8 Blackf. 535, the Court say that "innkeepers, as well as common carriers, are regarded as insurers of the goods of their guests, while in their keeping, and are bound to make restitution for any injury or loss, not occasioned by the act of *God*, the common enemy, or by the negligence or fault of the guest."

This statement of the law as to the liability of innkeepers, is certainly broad enough to cover the case of a loss or injury happening without the negligence or fault of the innkeeper. But the question as to his liability under such circumstances, did not arise in the case, and was not involved in the decision; hence, what is said about such liability must be looked upon, not as the point decided, but as a general statement of the law as to the liability of innkeepers, without adverting to possible exceptions or qualifications.

The authorities all agree that an innkeeper is *prima facie* liable for any loss or injury to the goods of his guest, not occasioned by the act of Providence, the public enemies, or the fault of the guest; and the *prima facie* liability is based upon the presumption that the loss or injury arose from the negligence or fault of the innkeeper. *Hill v. Owen, supra*.—Story on Bailm. § 472.

But there are *dicta* and decisions to the effect that an innkeeper is liable for any such damage or loss, although it happened without his default. In *Washburn v. Jones*, 14 Barb. 193, it is said that the innkeeper "was bound to answer for all losses and damages happening, even without his fault, excepting such as were caused by inevitable accident, or the public enemy." In *Mason v. Thompson*, 9 Pick. 280, the same doctrine is held. It is there stated that "innkeepers, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of *God*, or the common enemy, or the default of the owner of the property."

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1858.

LAIRD
v.
EICHOLD.

In *Shaw v. Berry*, 31 Maine R. 478, and *Sibley v. Aldrich*, 33 N. H. R. 553, it is held that proof by the innkeeper that there was no negligence in himself, or his servants, is not sufficient for his immunity. This doctrine, however, we think is not in accordance with the weight of authority, nor are we satisfied entirely with the principle on which it rests.

The case of *Richmond v. Smith*, 15 Eng. Com. Law, 144, is quoted in some of the above cited cases, as sustaining the position that innkeepers are liable, notwithstanding they may have exercised proper care and diligence; but the case does not seem to sustain that position. Lord TENTERDEN, C. J., remarks that "the situation of the landlord was precisely analogous to that of a carrier." But BAILEY, J., says: "It appears to me that an innkeeper's liability *very closely resembles* that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God, or the king's enemies.

Judge STORY, in his work on Bailments (§ 472), states the law as follows:

"But innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest, while at an inn, will be presumptive evidence of negligence on the part of the innkeeper, or of his domestics. But he may, if he can, repel this presumption, by showing that there has been no negligence whatever; or that the loss is attributable to the proper negligence of the guest himself; or that it has been occasioned by inevitable casualty, or by superior force."

And in § 482—"What circumstances will exonerate the innkeeper. By the common law, as laid down in *Calve's Case*, an innkeeper is not chargeable unless there is some default in him, or his servants, in the well and safe keeping and custody of his guest's goods and chattels within his common inn; but he is bound to keep them without any stealing or purloining. This doctrine, however, ought, perhaps, to be understood with this qualification—that the loss will be deemed *prima facie* evidence of negligence, and that the innkeeper cannot exonerate himself, but by posi-

tive proof that the loss was not by means of any person for whom he is responsible, or was not of such a nature as that he by law ought to be held responsible therefor."

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v.
EICHOLD.

The cases of *Dawson v. Chamney*, 48 Eng. Com. Law, 164; *Kisten v. Hildebrand*, 9 B. Mon. 72; *Metcalf v. Hess*, 14 Ill. R. 129; and *McDaniels v. Robinson*, 26 Verm. R. 316, fully establish the doctrine that an innkeeper is only *prima facie* liable for loss or damage to the goods of his guest, while in his possession, and that he may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants, for whom he is responsible.

This, we think, is the correct doctrine, founded on principle, as well as authority.

Innkeepers, on grounds of public policy, are held to a strict accountability for the goods of their guests. The interests of the public, we think, are sufficiently subserved, by holding the innkeeper *prima facie* liable for the loss or injury of the goods of his guest; thus throwing the burthen of proof upon him, to show that the injury or loss happened without any default whatever on his part, and that he exercised the strictest care and diligence. And it is more in accordance with the principles of natural justice, to permit him to exonerate himself by making such proof, than to shut the door against him, and hold him responsible for an accident happening entirely without his default, and against which strict care and prudence would not guard.

The charge, in the unqualified terms in which it was given, we think was wrong, and the judgment should be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for a new trial.

H. P. Biddle and *L. Chamberlain*, for the appellant.

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1858.

BEESON v. FOLEY.

KING
v.
WILKINS.

Friday,
May 28.

APPEAL from the *Wayne* Circuit Court.

Per Curiam.—This case turns entirely upon the weight of evidence. We think it sustains the judgment.

The judgment is affirmed with 3 per cent. damages and costs.

O. P. Morton and *J. F. Kibbey*, for the appellant.

J. S. Newman and *J. P. Siddall*, for the appellee.

KING v. WILKINS and Others.

Assignment of error as follows: "That the Court below dismissed the plaintiff's bill, and gave judgment for the defendants, when by the law, said Court should have given judgment for the plaintiff. *Held*, bad.

Friday,
May 28.

APPEAL from the *Vigo* Circuit Court.

WORDEN, J.—This was a bill in chancery, filed under the old practice, but heard and determined under the new. The object of the bill was to secure certain property claimed to be due the complainant for rent, and to enjoin the sale of the same.

The cause was tried by the Court, and there was a finding for the defendants. Motion for a new trial made and overruled; and judgment for defendants on the finding.

The plaintiff duly excepted to the decision of the Court overruling the motion for a new trial, and took a bill of exceptions setting out the evidence. This is all the exception there was taken in the Court below.

The only error assigned is, "that the Court below dismissed the plaintiff's bill, and gave judgment for the defendants, when by the law, said Court should have given judgment for the plaintiff."

Passing over the fact that the exception was taken to

one ruling of the Court, and the error assigned is upon another, we think the above assignment of error is wholly insufficient. The statute requires a *specific* assignment of all errors relied upon. 2 R. S. p. 161, § 568. Questions under this section have frequently been before this Court. The case of *Kimball v. Sloss*, 7 Ind. R. 589, is directly in point, where the error assigned was, that the judgment was for *Sloss* when by law it should have been for *Kimball*. It was held that the error assigned raised no question for the consideration of the Court.

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1858.

GRIFFIN
v.
LYNCH.

That case is decisive of the present.

Per Curiam.—The judgment is affirmed with costs.

A. Kinney, for the appellant.

T. H. Nelson, for the appellees (1).

(1) *Mr. Nelson* cited 2 R. S. p. 161; 7 Ind. R. 580; *Id.* 589; 8 *id.* 257, 499, 96, 471.

GRIFFIN and Others v. LYNCH and Another.

APPEAL from the *Tippecanoe* Circuit Court.

Friday,
May 28.

Per Curiam.—This was a proceeding to obtain partition of certain real estate.

The record shows that exceptions were taken to the finding and judgment of the Court; but no motion for a new trial was made, so as to enable the Court to review its finding or embody the evidence in a bill of exceptions. We cannot distinguish this class of cases from ordinary adversary proceedings, in which such motion is necessary to present the questions attempted to be raised in this case for our consideration.

The judgment is affirmed.

S. A. Huff, *Z. Baird* and *J. M. La Rue*, for the appellants.

R. C. Gregory and *R. Jones*, for the appellees.

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1858.

LIVINGSTON
v.
HARVEY.

Friday,
May 28.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
SLAUGHTER.

APPEAL from the *Morgan* Court of Common Pleas.

Per Curiam.—The judgment in this case is reversed for the reasons given in the case of *The New Albany and Salem Railroad Co. v. Fields*, at the present term.

The judgment is reversed with costs. Cause remanded for a new trial.

W. R. Harrison and *J. W. Gordon*, for the appellants (1).

D. M'Donald and *A. G. Porter*, for the appellee (2).

(1) Counsel for the appellants cited the following cases:

Parol evidence is not admissible to vary or defeat a written contract—especially when such evidence goes only to facts contemporaneous with such written contract. *Blair et al. v. Williams*, 7 Blackf. 132.—*Graves v. Clark*, 6 id. 183.—*Wilson v. Black*, id. 509.

(2) Counsel for the appellee cited the following:

The bill of exceptions must show that an objection to the admission of evidence was made when the evidence was offered, and that the Court was informed of the particular objections to its admission. 5 Ind. R. 300.—6 id. 453.—*Houston v. Houston*, 4 id. 139.

It has been decided that an informal subscription for stock to a preliminary paper, seems but a provisional act, and inoperative unless pursued through the remaining forms of the statute. *Troy and Boston Railroad Company v. Tibbits*, 18 Barb. (N. Y.) 298.

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Case 2
165 424

LIVINGSTON and Others v. HARVEY.

Friday,
May 28.

APPEAL from the *Marion* Court of Common Pleas.

Per Curiam.—*Harvey* brought a suit against "*Livingston, Fargo & Co.*, and *Wells, Butterfield & Co.*, as proprietors of, and doing business under the name and style of, the *American Express Co.*"

There was no appearance below. Judgment for plaintiff. *Livingston & Fargo, Wells & Butterfield* appeal.

The summons does not give the names of the defendants differently from the complaint. The judgment is against the defendants.

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1858.

THE STATE
v.
HILL.

The names should have appeared in some part of the proceedings (1).

The judgment is reversed with costs. Cause remanded, &c.

H. C. Newcomb and *J. S. Harvey*, for the appellants.

J. L. Ketcham and *I. Coffin*, for the appellee.

(1) See 3 Blackf. 322, and cases there cited.

THE STATE v. HILL.

The use of land for a highway for such a length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, is sufficient to raise a presumption that the owner intended a dedication to the public.

It is not necessary under our statute that the highway should have been established by authority.

10	219
127	136
10	219
138	571
10	219
165	130

APPEAL from the *Marion* Court of Common Pleas.

Friday,
May 28.

DAVISON, J.—Information for obstructing a public highway. Plea, not guilty; and verdict of acquittal. The state appeals upon a reserved case.

Upon the trial, it was, among other things, proved that the highway charged to have been obstructed, had not been laid out and established, in any mode prescribed by law. And the evidence being closed, the counsel for the state moved to instruct as follows:

“If the jury believe that the road in question had been used and traveled by the public, and worked by competent authority for a series of years, say from ten to fifteen years next before the alleged obstruction, and that the obstruction complained of had been placed upon the road by the defendant, they should find him guilty.”

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1858.

THE STATE
v.
HILL

This instruction was refused. But the Court instructed that—

“If the jury believe from the evidence that the road charged to have been obstructed has been worked by competent authority, and used by the public, uninterruptedly, for twenty years next before the alleged obstruction, they should find the defendant guilty, if it has also been proved that he obstructed the road as charged.”

The instruction given is evidently based upon section 45 of an act relative to the opening, &c., of highways, which declares that “All public highways which have been, or may hereafter be, used as such for twenty years or more, shall be deemed public highways.” 1 R. S. p. 315. But we have given a construction to that section which does not favor the ruling of the Common Pleas. In *Hays v. The State*, 8 Ind. R. 425, it was held that that statute, though it makes twenty years user an absolute bar, does not impair the right of the public to insist upon a dedication, in accordance with the common-law rule. And under that rule, it has been decided that the unopposed user of a highway by the public, over the land of an individual who is cognizant of the fact, for a much less period than twenty years—say four or five years—was sufficient to raise the presumption of a dedication. Indeed, the weight of authority seems to be, that the use of land for a highway for such a length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, would be evidence that the owner intended a dedication to the public. *Jarvis v. Dean*, 3 Bingh. 447. —2 Greenl. Ev. § 662.

The statute upon which this prosecution is founded, does not require that the highway obstructed should have been established by competent authority. And if, in this instance, it had been used, traveled and worked on, uninterruptedly for ten, or even a less number of years, the jury had the right to infer a dedication by the owner of the land over which the highway passed, and, consequently, to find that the defendant had no right to obstruct it. It follows

that the instruction of the Court is erroneous, and the one refused should have been given. May Term,
1858.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Tarkington, for the state.

WAYNE
TOWNSHIP.
v.
ALEXANDER.

WAYNE TOWNSHIP and MARSH, Treasurer, v. ALEXANDER.

By the school law of 1855, township trustees cannot levy a tax of more than 25 cents on each 100 dollars for the erection and repair of school-houses; but they may levy an extra tax to pay a debt contracted under the school law of 1852.

APPEAL from the *Owen* Circuit Court.

Friday,
May 28.

PERKINS, J.—Application for an injunction to restrain the collection of a school tax. Injunction granted. Appeal.

It appears that *Wayne* township had contracted a debt of between 3,000 and 4,000 dollars, for the building of school-houses under the school law of 1852; and that the trustees of the township levied a tax of 60 cents on the 100 dollars to liquidate the debt. The tax was levied under sections 8 and 9 of the school law of 1855, Acts, p. 162. Those sections are as follows:

“Sec. 8. The board of trustees shall take charge of the educational affairs of the township, employ teachers, subject to the provisions hereafter mentioned, and shall establish and conveniently locate a sufficient number of schools for the education of the children therein. They may also establish graded schools, or such modifications of them as may be practicable.

“Sec. 9. They shall have power to levy a tax in their respective townships for the construction and repair of school-houses, and for the providing of furniture and fuel therefor; but no such tax shall exceed the sum of twenty-five cents on each one hundred dollars of property, and fifty

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cents on each poll, in any one year, and they may credit each tax-payer upon such levy with two-thirds of any tax paid, or donation made for the building of school-houses, within five years prior to the taking effect of the act of *June 14, 1852*; and they shall levy taxes to pay any amounts due for the erection of school-houses, which were in whole or in part erected under the provisions of an act entitled 'An act to provide for a general and uniform system of common schools and school libraries, and matters properly connected therewith,' approved *June 14, 1852*. And any tax-payer who may choose to pay to the treasurer of the township wherein said tax-payer has property liable to taxation, any amount of money, or furnish building materials for the construction of school-houses, or furniture, or fuel therefor, shall be entitled to a receipt from the trustees of said township, which shall exempt such tax-payer from any further taxes for said purposes until the taxes of such tax-payer, levied for said purposes, would, if not thus paid, amount to the sum or value of the materials so paid: *Provided*, that said building materials or furniture and fuel shall only be received at the option of the proper township trustees."

The injunction was granted upon the ground that the trustees could not levy a tax exceeding the sum of 25 cents on the 100 dollars in any one year. But we think that limit is fixed upon taxation for constructing, repairing, &c., school-houses under the law of 1855; and that the latter part of the section authorizes an extra tax to pay debts contracted under the law of 1852.(1).

The injunction was wrongly granted.

Per Curiam.—The decree is reversed with costs. Cause remanded to be dismissed.

W. M. Franklin, for the appellants.

(1) See *Lafayette v. Jenners*, and cases cited, *ante*, 70.

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SUTTON v. SEARS.

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A. purchased of *B.*, by a verbal contract, a parcel of land, paid part of the purchase-money, took possession, and made improvements; but afterwards they agreed to rescind the contract, *A.* agreeing to surrender the possession and improvements about the first of *March*, and *B.* agreeing to give *A.* a horse worth 110 dollars, and certain notes. The horse was delivered and accepted. On the 28th day of *February*, *A.* tendered the possession, &c., and removed from the premises. *B.* refused to execute the notes. *A.* brought suit.

Held, 1. That the contract was not void for uncertainty.

2. That it was not void by the statute of frauds.

APPEAL from the *Rush* Circuit Court.Friday,
May 28.

PERKINS, J.—*Sears* filed his complaint against *Sutton*, alleging that on, &c., at, &c., by a verbal contract, he, *Sears*, purchased of *Sutton* a parcel of land, paid part of the purchase-money, took possession, and made improvements to the value of 500 dollars; that subsequently, on, &c., at, &c., it was agreed between the parties that said contract of purchase should be rescinded, upon the following terms, that is to say: *Sears* was to surrender the possession of the premises, and improvements thereon, to *Sutton*, about the first of *March*, 1856. *Sutton* was to give the plaintiff, *Sears*, a horse at 110 dollars, which was then and there actually delivered and accepted, and execute to him two notes, one for 90 dollars, payable on the 25th day of *December*, 1856, and the other for 100 dollars, payable on the 25th day of *December*, 1857. The complaint further alleges that on the 28th of *February*, 1856, he, the plaintiff, tendered to said *Sutton* the possession of said lands and improvements, and removed therefrom himself, but that *Sutton* refused to execute the notes, &c., and still refuses.

The defendant demurred to the complaint. The Court overruled the demurrer. Answer in denial. Trial. Judgment for the plaintiff for the amount for which notes were to have been executed, less the interest. It is claimed that the Court erred in overruling the demurrer to the complaint, for two reasons:

1. That the contract is void for uncertainty.

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2. That it is void by the statute of frauds.

We are unable to satisfy ourselves that the contract is void for uncertainty. The terms of it are sufficiently plain and explicit. It comes to this: *Sears* was to surrender a right to *Sutton*, and *Sutton* was to pay him a specified consideration for the surrender. One was to do, the other was to give. This, according to all the books, constitutes a good contract.

Nor do we think it is void by the statute of frauds.

At common law, verbal or parol contracts, otherwise legal, were generally valid. The contract was complete when the minds of the contracting parties arrived at mutual consent, without delivery of the subject-matter, or payment of the consideration. 2 Wend. Black., top pp. 441 to 449.—*Ramsey v. Kochenour*, 8 Blackf. 325.—*Bradley v. Michael*, 1 Ind. R. 551.—*Wright v. Maxwell*, 9 *id.* 192.

But by the statute of frauds, certain parol contracts cannot be enforced, unless something further has been done. 1 R. S. p. 299, *et seq.* They are—

1. Those which charge an executor, &c.
2. Those which charge a person for the debts of another.
3. Those which charge persons upon promises in consideration of marriage.
4. Those which are not to be performed within a year, &c.
5. Those which charge persons for representations of character, &c.

It is needless to say the contract sued on does not fall within any of these specifications.

But there are two more, besides the provision in relation to trusts. They are—

1. Contracts for the sale of land.
2. Contracts for the sale of goods for the price of 50 dollars or more.

Does the contract sued on fall under either of these specifications? If not, it is not embraced by the statute, and remains good at common law.

It is not a contract for the sale of lands. The title to the land in question was in *Sutton* already. And the im-

provements put upon them, being permanent buildings, &c., were a part of the lands—the realty—and the title to them went with that to the lands.

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It was held under our former statute of frauds, which prohibited the enforcement of verbal contracts for the sale of lands, “or any interest in or concerning them,” that a sale of crops growing upon lands, or a relinquishment of improvements made upon them, was not within the statute. *Northern v. The State*, 1 Ind. R. 113.—*Bricker v. Hughes*, 4 *id.* 146.—*Green v. Vardiman*, 2 Blackf. 324. If such were the case under the power, much less would such contracts fall within the present statute of frauds, which omits the clause in relation to “interest in or concerning” lands.

Is the contract one for the sale of goods? It is, if within the statute at all; and if so regarded, it is liable to be enforced because earnest was paid upon it. As *Sutton* had paid 110 dollars upon the contract, he could have enforced it against *Sears*. But the remedy must be mutual. The suit was sustainable.

The finding of the jury cannot be disturbed upon the merits.

The damages were not excessive. 2 Parsons on Contracts, 1st ed., p. 485, and notes.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

A. W. Hubbard and *L. W. Sexton*, for the appellant (1).

P. A. Hackleman and *G. C. Clark*, for the appellee (2).

(1) Counsel for the appellant cited 1 Saund. Pl. Ev. 112, 114, 115, 126; *Smith v. Smith*, 8 Blackf. 208; *Bailey v. Ricketts*, 4 Ind. R. 488; *Howard v. Easton*, 7 Johns, 205; 4 Ind. R. 461; *Rowan v. Lytle*, 11 Wend. 617; 1 R. S. p. 303, § 22; *Id.* p. 299, § 1; *Id.* p. 233, § 4; *Reed v. Rudman*, 5 Ind. R. 409.

(2) Counsel for the appellee cited *Green v. Vardiman*, 2 Blackf. 324; *Benedict v. Bebee*, 11 Johns. 145; *Frear v. Hardenburgh*, 5 *id.* 272; *Noyes v. Chapin*, 6 Wend. 461; *Storms v. Snyder*, 10 Johns. 109; 1 Pars. Cont. 314; *Lower v. Winters*, 7 Cow. 263; 2 Pars. Cont. 485; 21 Wend. 90; 2 Blackf. 465; 3 *id.* 304.

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1858.

FERRY v. JONES.

FERRY
v.
JONES.

Friday,
May 28.

APPEAL from the *Bartholomew* Circuit Court.

Per Curiam.—Suit upon a promissory note executed by *Thomas G. Ferry* to *T. G. Lee*, payable at *A. B. Hunt & Co.'s, Louisville*. The note was indorsed, *T. G. Lee*.

Answer. Trial. Judgment for the plaintiff.

The Court permitted a substituted complaint, for a previous one lost, to be filed. The reasons assigned for or against the permission do not appear.

It was in the power of the Court to permit such substitution; and as the reasons upon which the Court acted do not appear, we must presume them to have been sufficient.

The Court permitted the plaintiff to fill up the blank indorsement to himself. This could be done upon the trial; and even if not done, was unimportant. *Clark v. Walker*, 6 Blackf. 82. See *Bowers v. Headen*, 4 Ind. R. 318.

The Court refused to permit an amendment to the answer. The proposed amendment was a general one of a set-off, without accompanying it, as the statute requires, with a bill of the particulars of the set-off. Without specifying other reasons, this is sufficient to sustain the action of the Court.

The second paragraph of the answer, which went to the ownership of the note, would seem, from the cases of *Lamson v. Falls*, 6 Ind. R. 309, and *Swift v. Ellsworth et al.*, at the present term (1), to be insufficient to put the question in issue. It should have shown to whom the note was indorsed.

The judgment is affirmed with 1 per cent. damages and costs.

R. Hill, for the appellant.

W. Herod and *S. Stansifer*, for the appellee.

(1) *Ante*, 205.

SHAW and Another v. BINKARD.

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1858.SHAW
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An agreement between the principal maker and the payee of a promissory note, without the consent of the surety, to extend the time of payment, in consideration of usurious interest, does not discharge the surety.

In a suit upon promissory notes, an answer admitting the execution as surety, setting up payment as to part, and a discharge as to the balance, by an agreement between the principal and the creditor for an extension of time for a valid consideration paid to the latter, without the consent of the surety,—is good on demurrer.

Judgment by default may be taken against a defendant properly served with process; and where an entry of default was not made, it is amendable in the Court below, and on appeal, the amendment will be presumed to have been made.

A motion for leave to amend after the evidence has been heard is addressed to the discretion of the Court, and where neither the evidence nor the proposed amendment are in the record, this Court cannot say that the Court below has abused its discretion.

APPEAL from the *Wabash* Court of Common Pleas.

Friday,
May 28.

HANNA, J.—The appellee sued the appellants on two promissory notes, one due *July* 31st, and the other, *December* 23d, 1853. One of the defendants, *John S. Shaw*, did not appear; the other, *Benjamin T. Shaw*, filed his answer, containing five paragraphs, and certain interrogatories to the plaintiff.

There was a demurrer to the first, second, third and fifth paragraphs of the answer, which was sustained.

Judgment was rendered, on motion of plaintiff, against *John* “for failing to answer or demur as required by the rules of this Court,” as appears by the record.

The appellants insist that these rulings of the Court are erroneous.

The first paragraph of the answer alleges that said *Benjamin* executed the notes as surety only, *John* being principal; and that on the first of *March*, 1854, the plaintiff, without the knowledge or consent of the said defendant, agreed with said *John* to extend the time for the payment of said notes for three months from the time said notes became due, in consideration that said *John* would pay said plaintiff the sum of 12 dollars, which he then did, for said forbearance.

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The second paragraph sets up a similar agreement made on the first of *June*, 1854, for three months from the expiration of the former term, mentioned in the first paragraph.

The third sets up a similar agreement, alleged to have been made on the 15th of *February*, 1854, to extend the time of payment for three months from the time the notes were, on their face, due, in consideration that said *John* would pay said plaintiff interest at the rate of twelve and one-half per cent. per annum, in advance, which he did; and that said plaintiff well knew said *Benjamin* was surety only on said notes.

Is an agreement of forbearance, made by a creditor with his principal debtor, in consideration of the reception of usurious interest, a discharge of the surety?

In the case of *Harbert v. Dumont*, 3 Ind. R. 348, which was an action on joint and several promissory notes, a part of the defendants, by their fourth plea, set up that the plaintiff, in consideration of various usurious agreements (which are described), gave the principal (they being sureties only) further time for payment without their consent, &c. The replication was, that further time was not given as alleged; and Judge BLACKFORD, in the opinion, says: "The materiality of that issue depends upon two questions; first, whether the consideration for the agreements to give time was valid; and if so, then, secondly, whether the giving of the time discharged the sureties."

The Court in that case decided that the consideration for the agreements to forbear was valid, although usurious; because by the statute of 1845, which was in force when the agreements were made, the plaintiff had a right to retain the interest, and the receipt of the same was a benefit to him. It is further decided, in the same case, that a valid agreement not to sue for the debt for a limited time, made by a creditor with his principal debtor, discharges his surety. See, also, 10 Curtis's R. 104; 7 *id.* 353; 6 Peters, 250; 12 Wheaton, 554; 6 Ind. R. 134.

The statutes in force when the agreements set up in the answer in this case were made, fix the rate of interest at six per cent. per annum; make the contract valid as to the

principal, but invalid in case a reservation of usurious interest is contracted for, as to that interest; give authority to the person paying, &c., to recover such interest; and make the receiving, &c., of usurious interest an offense punishable by fine. It follows that a contract, by note, for a greater rate of interest than six per cent. per annum, is, as to the interest, illegal, not binding, and it cannot be enforced.

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The various contracts to extend the time of payment, as set up in the answer in this case, being based upon the reception of usurious interest, which the debtor had the right, by statute, to sue for and recover, we conceive that such agreements were not binding, effectual and operative in point of law. Story on Promissory Notes, § 413.—Burge on Suretyship, p. 204.—1 Comstock, 286.—1 Parsons on Contracts, p. 513, note *y*. The first authority cited is to the effect that the agreement must be “one founded upon a valuable consideration, and operative in point of law.” The next authority is that the creditor must, “by some valid and effectual engagement, deprive himself of the power of suing the principal.” Again, “in all these cases, time so given must be by contract which is binding.”

In the case of *Vilas & Bacon v. Jones & Piercy*, 1 Comstock, referred to, the Court of Appeals of *New York* decided directly, that an agreement between the principal and the creditor, without the consent of the surety, to extend the time of payment, did not discharge the surety, the consideration for the agreement being the payment of usurious interest. Judge BRONSON says, “I think it impossible to maintain that either the promise or the payment of usury, is a good consideration for a promise by the creditor to give time. It is no consideration at all. The creditor gets no benefit, and the debtor suffers no damage.” It is true that, in *New York*, such contracts were, by statute, void; but we are not, so far as this question is affected by the statutes, able to see any distinction between that case and this. There, the contract was void, and, therefore, of no binding efficacy. Here, the reception or reservation of the usurious interest is an illegal act, and so far from

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being binding, it is inoperative, for the reason that it is expressly provided by statute, that such interest may be recovered by the person, &c., who may have paid it, with damages. And although our statute so far differs from that of *New York*, as to permit the usurer to recover his principal, that recovery is without costs or interest. It, in effect, refuses him the right to enforce his agreement, but permits him to recover the actual amount paid out, as if it was so paid for the use of another.

The demurrer was properly sustained to the first, second and third paragraphs of the answer.

The fifth paragraph of the answer professes to answer the whole complaint, by admitting the execution of the notes as surety, only, as alleged, and avers payment of the same by said *John*, except the sum of 350 dollars, and as to that sum, that the plaintiff and the said *John*, in consideration of a certain sum of money then paid to said plaintiff, by said *John*, and without the privity or consent of said *Benjamin*, in *February*, 1854, entered into, and became bound by, a new contract to extend the time for the payment of said debt to a time agreed upon, the exact terms and consideration of which contract were not known to the defendant, but were to the plaintiff. There was no other answer filed, under which payment could be given in evidence. Is this a good answer to the whole, or any part of the complaint?

It is urged that this paragraph of the answer is too uncertain and indefinite, and, therefore, the demurrer was properly sustained. It admits the execution of the notes; and as to a part, alleges payment; and as to the balance, attempts to plead a discharge, or such acts by the creditor as estop him from seeking a recovery from the said defendant. But should it set out the terms of the new contract, by which time was given to the principal?

We think it states substantially a good defense. It states there was a consideration paid by the principal to the plaintiff. We will not presume that consideration to have been illegal. If it was satisfactory to the plaintiff, and upon its reception, and in consequence thereof, for-

bearance was given to the principal, without the knowledge or consent of the surety, he would be discharged. The question is, does the answer show the "existence of such a contract for delay as, if violated, would give the principal debtor a right of action." 6 Ind. R. 134. That the agreement was made after the notes became due, cannot change the rights of the surety. That the answer does not allege the precise time which the plaintiff was to forbear, is not a substantial defect in the pleading; he agreed to extend the time of debts already over due, to a period agreed upon.

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The exception taken to the ruling of the Court, in striking out a portion of the interrogatories filed with the answer, is considered as waived under the 28th rule of this Court, no point having been made thereon in any of the briefs filed by counsel.

The next question presented, is as to the correctness of the proceedings of the Common Pleas Court, in rendering judgment against the defendant, who did not appear. He had been properly served with process, and a judgment by default might have been taken against him. 8 Ind. R. 869. If a formal entry of default was not made, it was amendable in the Court below, and will be regarded as amended here. *Id.*

The last point raised is, that the Court refused to permit the defendant, *Benjamin*, to file an additional paragraph to his answer. The motion for leave to do so was made after the evidence was heard. The evidence is not in the record; nor is the paragraph proposed to be filed, properly there. It is true, the clerk includes what he calls the paragraph; but it is not contained in a bill of exceptions, as it should be to form a part of the record. This was a discretionary matter with the Court; and unless the record contained the evidence, and the answer proposed to be filed, this Court could not say whether the ruling was a sound exercise of legal discretion, or an abuse thereof.

For the error in sustaining the demurrer to the fifth paragraph of the answer, the judgment must be reversed for further proceedings, in conformity with this opinion.

May Term, 1858. *Per Curiam*.—The judgment is reversed with costs.
Cause remanded. &c.

BROWN
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LEWIS.

H. C. Newcomb, J. S. Harvey and J. H. Matlock, for the appellants.

H. P. Biddle, for the appellee.

BROWN and Wife v. LEWIS.

Where the sum demanded in the conclusion of a complaint in the Common Pleas exceeds the jurisdiction, the Court may permit an amendment reducing the claim to an amount within the jurisdiction.

If an answer is valid on its face, and no facts exist peculiarly within the judicial knowledge of the Court, showing it to be a sham defense, it should not be stricken out upon affidavit of its falsity.

Friday,
May 28.

APPEAL from the *Grant* Court of Common Pleas.

HANNA, J.—This was a suit upon a note, and to foreclose a mortgage. The plaintiff, in his original complaint, demanded judgment for 1,600 dollars, the amount of the note, and that the mortgage be foreclosed, &c.,

There was no demurrer filed.

The defendants answered, admitting the execution of the note and mortgage; that they had paid on the same the sum of 1,035 dollars; that said note was given for the consideration of certain lands, &c.; and that the plaintiff had no title to said lands.

The Court, on motion of plaintiff, permitted him to amend his complaint by inserting that the defendants were entitled to a credit of 1,035 dollars, for so much paid on said note, and demanding judgment for 900 dollars. This was objected and excepted to.

The Court likewise sustained a motion made by plaintiff, based upon affidavits, to strike out that portion of the answer which alleged a want of title in the plaintiff, at the time of sale of the lands named. This was also objected and excepted to.

These two exceptions present the only points insisted upon by counsel.

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1858.

No question was made in the Court below, as to the jurisdiction of that Court; but it is now urged that before the amendment was made the sum demanded in the body and at the conclusion of the complaint was above the jurisdiction of the Court; and that such jurisdiction could not be acquired by permitting the plaintiff to amend by alleging credits which would so far reduce the amount claimed as to bring it within the statutory sum.

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This is a similar question to that presented to us in the case of *Epperly v. Little*, 6 Ind. R. 344, which has been followed in other cases.

From the offer to amend, by giving credits which would reduce the amount due to less than 1,000 dollars, it is manifest that not more than that sum was claimed by the plaintiff, and we think, under our liberal statute of amendments, the Court did not err in permitting such amendment.

It is contended by the appellants, and several authorities cited to sustain the position, that in a Court of limited jurisdiction the complaint must show that such Court has jurisdiction. In *Wetherill et al. v. The Inhabitants, &c.*, 5 Blackf. 357, it is decided that the Court in which the suit was instituted had no jurisdiction, because of the magnitude of the sum; and yet this Court sent the case back with leave to the plaintiffs to amend the declaration. The inferior Court, in the case at bar, did nothing more than grant such leave.

As to the other question, the affidavits of counsel and of the plaintiff were filed, stating that the title conveyed was valid; that the defense attempted to be set up was a sham defense, for the purpose of delaying the plaintiff, &c.; and that defendants had conveyed the land to a third party, whose affidavit was also filed, stating that he had purchased the land of defendants, who represented the title as valid, &c.

Upon these affidavits, and the admission of counsel who filed the plea that he knew of no defect in the title, a rule was granted against the defendants to show cause against

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striking out that portion of the answer included in the motion. No cause being shown, the motion was sustained.

We think there was error in this. The defendants, in answer to the rule, might have set up in affidavits, that the answer was filed in good faith; and thus have made a trial on affidavits. *Walpole v. Cooper*, 7 Blackf. 100. The Court had the power under the statute to strike out the paragraph, as setting up a sham defense (5 Blackf. 287; 2 R. S. p. 44; Van Santvoord's Pl. 593, 594, and authorities cited), where the answer was irregular, &c.; and, indeed, the last cited authority appears to indicate pretty strongly that it is now settled in *New York* that a plea, good on its face, may, on affidavits of its falsity, &c., be stricken out. But we think the better practice is to avoid such trials upon affidavits, and that if the answer is legal on its face, and no facts exist, peculiarly within the judicial knowledge of the Court, showing it to be a sham defense, it should stand.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Steele, H. D. Thompson and J. Brownlee, for the appellants (1).

I. Van Devanter and J. F. McDowell, for the appellee (2).

(1) Touching the jurisdiction, counsel for the appellants cited *Bryan v. Blythe*, 4 Blackf. 249; *Perkins v. Smith*, *id.* 299; *Beard v. Kinney*, 6 *id.* 425; *Wetherill v. The Inhabitants*, &c., 5 Blackf. 357.

(2) Touching sham defenses, counsel for the appellee cited 2 R. S. p. 44, § 77; 8 Barb. (S. C. R.) 79; 2 Cow. 637; 18 Wend. 567; 1 Barn. & Cress. 286; 4 How. Pr. 115; 6 *id.* 360, note; *Id.* 357; *Darrow v. Miller*, 5 *id.* 247.

THE OHIO INSURANCE COMPANY v. NUNEMACHER.

A person demanding the right to subscribe to the capital-stock of a corporation is not relieved from the necessity of making a tender, by the statement by the secretary of the company that he has no stock for him.

In a suit against a corporation by a person demanding such right, parol evidence of the contents of a note and check tendered in payment for such stock, is inadmissible, unless the proper foundation for its introduction has been laid.

And, in such case, evidence of a demand of such stock, and of a tender of such note and check in payment therefor without legitimate evidence of their contents, coupled with proof that no money was offered, is not sufficient to support a finding for the plaintiff.

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APPEAL from the *Floyd* Circuit Court.

Friday,
May 28.

WORDEN, J.—This was an action by the appellee against the appellants, to recover damages for refusing to permit him to subscribe for stock in said company. The complaint avers, in substance, that the defendants were possessed of a capital-stock of 100,000 dollars, divided into shares of 50 dollars each, and that the plaintiff was the holder and owner of sixty of those shares; that afterwards, the defendants by a vote of their directors, increased their said capital-stock to 200,000 dollars, whereby the plaintiff became entitled to subscribe for and receive as many shares in the new stock as he held in the old, upon paying the par value thereof, to-wit; 50 dollars on each share; that the plaintiff afterwards, to-wit, &c., offered to subscribe for sixty shares of the new stock, and has always been ready, &c., and that he offered to pay to said company all such sums of money as they had ordered to be paid in upon said subscription to the capital-stock, at such times as the company had ordered and consented that such sums should be paid; that he has always been ready to pay, &c., and that he demanded the certificates of stock, &c.; but the defendants wrongfully and unlawfully refused to permit him to subscribe for said new stock, and issue him certificates therefor, but, on the contrary, after the order was passed for increasing the stock, and before the books were publicly opened, the greater part of the stock was taken by the directors, and the residue by a few of their friends, whom the directors had invited to take stock, without any notice having been given, &c.; that the market value of said stock was 70 dollars per share, &c. Wherefore he claims 1,200 dollars damages.

There was a demurrer filed to the complaint, which was

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CHER.

overruled by the Court. The defendants then filed their answer, which led to issues of law and fact.

There appear to be two affirmative paragraphs of the defendants' answer, to which there is no replication. Without a determination of the issues of law, and in this state of the pleadings, the cause was submitted to the Court for trial of the issues of fact, and there was a finding for the plaintiff for 663 dollars. Motion for a new trial overruled, and judgment on the finding.

The errors specifically assigned are, that the Court erred in overruling the demurrer to the complaint.

That the Court erred in admitting improper testimony, over defendants' objection, and in refusing to award a new trial.

We cannot notice the irregularity in proceeding to the trial of the issues of fact before the issues of law were disposed of, and while the two paragraphs of the answer were unnoticed, as that is not assigned for error.

The decision of the Court in overruling the demurrer to the complaint was not excepted to, and therefore the question argued mostly, by counsel, is not properly before us. That question is, whether a stockholder in a joint stock corporation which has the power under its charter of increasing its capital-stock, has a right, upon such capital-stock being increased, to subscribe for and hold the new stock in proportion to his interest in the old. Or, in other words, whether the augmentation of the capital-stock is for the benefit of each stockholder in proportion to his stock. Such is the doctrine contended for by the appellee, and it seems to be sustained by the case of *Gray v. Portland Bank*, 3 Mass. R. 364; and Messrs. *Angell & Ames*, in their work on Corporations (§ 554, 5th ed.), refer to this case as a correct exposition of the law. On the other hand, it is contended that the stockholders have no vested right to subscribe for the new stock, upon such increase, but that the directors may permit any one to subscribe for the same, or put the same in market and sell it for a premium if they can; and especially can they do it, as is claimed, under the charter of the appellants.

Another question raised by the demurrer, and argued by counsel, is, whether the corporation would be liable in such case, or whether the directors or officers refusing to permit such subscription would be liable only in their individual and private capacity.

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We shall not decide either of these questions, as we should be going beyond what is legitimately presented by the record to do so.

Exceptions were duly taken to the decision of the Court, overruling the motion for a new trial, and the evidence all set out. The ground upon which a new trial was asked was, that the finding was not sustained by the evidence, and that improper testimony had been received, over the appellants' objection. It appears by the bill of exceptions, that the plaintiff below, proved by one *John R. Nunemacher*, the plaintiff's son, that he demanded on behalf of his father, of the secretary of the company, the privilege of subscribing for sixty shares of the increased stock, and produced a check and note in payment therefor. The appellants objected to parol proof of the contents of the note and check, the names of the owners or makers, or the amount thereof, and pointed out the obvious objection, that the note and check were the best evidence of the contents thereof, no foundation having been laid for the introduction of parol testimony; but the Court overruled the objection, and the appellants excepted. Thereupon, the plaintiff proved by the witness, without producing the note or check, or accounting for their absence, that the check was for 700 dollars or 900 dollars—witness did not recollect which—and the note for 2,400 dollars. The check was drawn by *D. Reisinger & Son*, on a banking-house in *Louisville*—did not recollect what house it was. It was a good check—that is, the drawers were good. The note was made by the plaintiff and indorsed by *Wm. W. Weir* and by *Reisinger & Son*. Witness laid the note and check down on the counter before *Applegate*, the secretary of the company, but he, *Applegate*, did not pick them up. It further appears that the secretary told the witness to put the note in

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the "discount box," and when the company got money they would discount it, but he had not then looked at the note, and did not know whose it was. It further appears that the plaintiff's note, at four or six months, with *Reisinger & Son* and *Wm. W. Weir* as indorsers, would have been good at their counter for 3,000 or 4,000 dollars; and that a check by *Reisinger & Co.* on *Hunt* of *Louisville*, would have been treated as money. It further appears that, when the witness demanded the stock for his father, *Applegate*, the secretary, replied that he had no stock for Mr. *Nunemacher*; and also, that *Nunemacher* never offered any money, nor did any one for him.

This is all the testimony that seems to have any bearing on the subject of an offer by the plaintiff to pay for the stock.

We do not think that the statement of the secretary that he had no stock for Mr. *Nunemacher*, dispenses with the necessity on the part of *Nunemacher* to make such offer.

We think the Court below erred in admitting parol evidence of the contents of the note and check. The names of the makers and indorsers of the note, and the drawers of the check, and the respective amounts of each, are certainly substantial parts of the contents thereof.

It is suggested by counsel, that the papers were not of a character to be kept, and that the proof is not so much of their contents, as of their character for solvency, and amounts.

If the papers were not kept, but lost or destroyed, it would have been an easy matter to lay the proper foundation for the introduction of parol evidence of their contents. The objection is not to the introduction of parol evidence of the solvency of the makers or drawers, but to parol evidence showing who were the makers and drawers, and the amounts.

Without this evidence, we think there was not enough before the Court to sustain the finding. Strike that out, and all the evidence on the subject of the offer to pay by

the plaintiff is, that his agent produced a couple of papers and demanded the sixty shares of stock, proposing to pay therefor with the two papers or the proceeds thereof.

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We conceive it to be extremely doubtful whether all the evidence introduced, sustains this part of the case. The witness is unable to state on whom the check was drawn, but it was on some banking-house in *Louisville*; nor does he recollect whether it was for 700 or 900 dollars. This uncertainty in human recollection and memory illustrates the propriety and necessity of adhering to the rule which requires the production of the best evidence, unless it be shown to be out of the power of the party to produce it. Bankers' checks are frequently taken and received as money, and in this case it is shown that a check by *Reisinger & Co.* on *Hunt* of *Louisville*, would be treated at the counter of the company as money. But it does not appear that this was drawn on *Hunt*. It might, for aught that appears, have been drawn on any other banking-house, and one with whom the company had no connection. It may have been a check that they would not receive as money, or otherwise, for any purpose. Again, it does not appear in whose favor the check was drawn, whether to the appellants, or some other person; nor whether, by its terms, it was negotiable and indorsed to her by some other payee. Neither does it appear to whom the note in question was payable. It is shown that a note of plaintiff, indorsed as this was, at four or six months, would be good at the counter of appellants; but it does not appear when this note was payable, and there is nothing before us from which we can infer that it was payable in six months or any other particular length of time.

It appears that some of the new stock subscriptions were paid in cash, some partly in cash and partly in notes to be discounted, and some entirely in notes to be discounted; but the above testimony does not show that the plaintiff offered to pay either in money, or to furnish for discount such notes as the corporation was receiving from others to be discounted and the proceeds applied in payment for stock.

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Per Curiam.—The judgment is reversed with costs.
Cause remanded for a new trial.

W. T. Otto and J. S. Davis, for the appellants.
J. Collins, for the appellee (1).

(1) Mr. *Collins* cited *Gray v. The Portland Bank*, 3 Mass. R. 364; *Union Bank v. McDonough*, 5 Louisiana R. 63; *The State v. The Bank of Columbus*, 10 Ohio R. 91; *Viner's Abr. tit. Stocks, A.*; 10 Johns. 484; 23 Pick. 168.

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A bill of sale of goods by a failing debtor, purporting to vest the property absolutely in the vendee in trust for a third person, in consideration of a previous indebtedness of the vendor to such third party, arising out of a breach of trust, is not within § 8 of the statute of frauds.

Friday,
May 28.

APPEAL from the *Marion* Court of Common Pleas.

WORDEN, J.—Action by the appellant against the appellee, to secure possession of certain personal property.

The cause was tried by the Court; finding by the Court for the defendant; motion for new trial overruled; exceptions taken, and judgment on the finding.

The evidence is all set out in the bill of exceptions, and consists of one deposition, and an agreement by the parties as to certain facts. The facts, as stated in the said agreement are, that the property in controversy was levied on by the defendant, on an execution in his hands as constable, on a judgment in favor of one *David Kemp*, against one *Albert E. Jones*; that *Cornelia Jones*, the plaintiff, being a sister of said *Albert*, held a bill of sale of the property in controversy, from the said *Albert*, of a date three or four days prior to the date of the said judgment; that said *Cornelia* resided as one of the family of said *Albert*, and that, at the time of the levy on said property, it was in the house occupied by said *Albert* and family, of which *Cornelia* was a member; that at the time of the execution of said bill of sale by said *Albert*, no money was passed, or

paid him for said bill of sale; that said property was then in the house occupied by him and his family; that said bill of sale purported to vest said property in said *Cornelia* absolutely, in trust for one *Lucy Jones*, in consideration of an indebtedness alleged to be owing to said *Lucy*, by said *Albert*; that after the execution of said bill of sale, said *Albert* left *Indianapolis* permanently, leaving his wife and the said *Cornelia* living in the house occupied by him, and the property remained in the house with them, and that said *Albert* was then in failing circumstances. It appears from the deposition, that one *Cornelia Jones*, mother of the plaintiff, by her last will and testament, devised certain real estate in *Youngstown, Ohio*, of the value of from 1,800 to 2,500 dollars, to *Ira Jones*, in trust for said *Lucy Jones*, who, it is to be inferred from the deposition, was *non compos mentis*; that by the terms of the will, upon the death of said *Ira Jones*, which happened about two years after the date of the will, which was dated *February 6, 1851*, the said trust was to be vested in the plaintiff, if she should be in a condition to accept and execute the same, and if not, then the said trust was to vest in said *Albert*, and he was to execute the same; that said *Albert* accordingly took charge of said *Lucy* and said property, until such time as said plaintiff should be able and willing to take charge thereof—the three, *Albert, Cornelia* and *Lucy*, living together, *Cornelia* having full control and management of her said sister *Lucy*—and the said *Albert* used the said property for and instead of said *Cornelia*; that said *Albert* exchanged the said property in *Ohio* for property in *Indianapolis*, and then sold that, and appropriated the proceeds thereof to his own use; that said *Albert* put property consisting of plank-road stock, notes and other property, consisting, as the witness understood, of household property, (the kind of property in controversy,) into the hands of said *Cornelia*, as part indemnity for the sale of said trust property.

The question before us is, whether on the above facts, the plaintiff is entitled to recover. There is no conflicting testimony. The decision below seems to have been upon

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questions of law growing out of the facts, as the facts were not disputed.

The ground taken by the appellee is, that the sale by *Albert* to *Cornelia*, the plaintiff, is void under § 8 of the act for the prevention of frauds and perjuries,—1 R. S., p. 301,—because it was not “accompanied by an immediate delivery, and followed by an actual change of the possession of the things sold.”

Said section is as follows:

“Sec. 8. Every sale made by a vendor of goods in his possession, or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual change of the possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, unless it shall be made to appear that the same was made in good faith, and without any intent to defraud such creditors or purchasers.”

A very brief glance at what appears to be the history of the above legislation, may not be inappropriate.

By the statute of 13th Eliz. c. 5, which is said to be simply declaratory of the common law, it was provided that every gift, grant, bargain, and conveyance of goods and chattels, with intent to hinder, delay or defraud creditors, &c., shall be utterly void, &c.

This statute, it is understood, has been always in force in this state, it being in aid of the common law, and having been enacted prior to the fourth year of the reign of JAMES the first. The most of the states in the *Union* have also adopted it. Under this statute, a great diversity of opinion has existed, as to the effect of a vendor or mortgagor retaining the possession of the property sold or mortgaged; some Courts holding that it was fraudulent *per se*, and conclusive, while others held it to be only *prima facie* evidence of fraud, which might be rebutted and explained. From *Twine's Case*, 3 Co. 80, down to modern times, both in *England* and the *United States*, the decisions have been various and conflicting; but the current of mod-

ern decisions seems to incline to the doctrine that it is only *prima facie* fraudulent.

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In *Watson et al. v. Williams et al.*, 4 Blackf. 26, Judge STEVENS has, with great industry and research, collected the various conflicting decisions, both in *England* and the *United States*. The question was settled in this state by the decision in that case, and the case following it, of *Hankins et al. v. Ingols*, *id.* 35, in which it was held that retaining such possession was only *prima facie* evidence of fraud, which might be rebutted.

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In 1843, this principle was, it is believed, for the first time incorporated into the statutory law of the state, substantially as in the section above quoted, R. S. 1843, p. 590, § 8. The legislature seems to have adopted the adjudications of the Supreme Court upon this question, leaving the presumption of fraud open, to be rebutted by any evidence legitimate for that purpose; and this is made abundantly clear by the 21st section of the same act, which provides that "the question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact," &c.

It is claimed by counsel for the appellant, that it does not appear but there was an actual delivery of the property, duly followed up by actual possession on the part of the plaintiff; or if there was no delivery, that the circumstances attending the case, and the situation of the parties, dispensed with the necessity of it; but we shall pass over these questions, and examine the case as to the fraudulent intent, starting out with the presumption, as the statute directs, that the transaction was fraudulent.

The bill of sale purports to vest the property absolutely in the plaintiff, in trust for the said *Lucy*, in consideration of an indebtedness from the said *Albert* to her; and if the bill stated the truth, no money should have passed, or been paid him for the bill of sale. In such a case, the passing of money, or making pretended payments, would look like a fraudulent device to cover up a dishonest transaction; because it would contradict what is expressed in the bill

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of sale itself, that it was in consideration of a previous indebtedness.

It appears that *Albert* was justly indebted to *Lucy*, in a sum between 1,800 and 2,500 dollars, for property disposed of by him as her trustee, the proceeds of which he had appropriated to his own use; and in his "failing circumstances" he was probably anxious to secure to her that indebtedness, as far as possible. This, we think, he had a legal right to do. A failing debtor may undoubtedly give a preference to one creditor or class of creditors, and a sale or assignment for such purpose is not treated as *mala fide*, but as merely doing what the law admits to be rightful. 1 Story's Equity Jurisprudence, § 370. We think the uncontradicted proof of this indebtedness, arising out of a flagrant breach of a trust reposed in him, followed up, as it was, by a bill of sale made in consideration of such indebtedness, removes the presumption of fraud that would otherwise attach to the transaction.

The evidence to repel the presumption of fraud in this case, we think is fully as strong, as in the case of *Sloan v. Kingore* and another, 3 Ind. R. 549, which fully sustains our decision.

Per Curiam. — The judgment is reversed with costs. Cause remanded for a new trial.

W. Wallace and *B. Harrison*, for the appellant.

R. L. Walpole, for the appellee.

THE EVANSVILLE, INDIANAPOLIS AND CLEVELAND STRAIGHT
LINE RAILROAD COMPANY v. SHEARER.

A person subscribing to the capital-stock of a corporation conditionally, is not to be considered a stockholder, or as liable on the subscription, until the company has performed the condition upon which his undertaking depends.

When that is done, he becomes a stockholder by force of the agreement of the parties, and the subscription becomes absolute.

Parol evidence is admissible to give effect to a written instrument, by applying

it to the subject-matter, by proving the circumstances under which it was made, whenever without the aid of such evidence the application could not be made in the particular case.

But such evidence is not admissible where there is no uncertainty in the instrument, especially if it contradict the terms of the instrument itself.

Evidence not pertinent to the issue is inadmissible.

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APPEAL from the *Jefferson* Circuit Court.

Friday,
May 28.

DAVISON, J.—The railroad company sued *Shearer* upon an instrument of writing which is as follows:

"The undersigned subscribed to the capital-stock of the *Evansville, Indianapolis and Cleveland Straight Line Railroad Company*, the amounts and lands attached to our names, upon the express condition that the road shall be permanently located on the east side of *White River*, within one mile of the road run between *Indianapolis* and *Spencer*. Cash stock will be payable, not exceeding ten per cent. every ninety days, at the requisition of the board. Lands may be taken within ten miles of the line, to be appraised as per by-laws. August 11, 1853. [Signed,] *William Shearer*. (If *Martinsville* be made a point) 20 shares."

The complaint avers that the shares subscribed were each 50 dollars, amounting in the aggregate to 1,000 dollars; and that the company's board of directors, at their session on the 12th of *May*, 1854, by resolve, required ten per cent. of all cash subscriptions to the capital-stock to be paid each ninety days thereafter, of which the defendant had due notice; that the plaintiff has complied with all the conditions of the subscription on her part to be performed, and that said subscription remains due and unpaid, &c.

The defendant answered, 1. By a general denial. 2. That the railroad was not, at the commencement of this suit, permanently located on the east side of *White River*, within one mile of the line run between *Indianapolis* and *Spencer*. 3. Denying that the plaintiff has located her road permanently on the east side of *White River*, within one mile of the line between *Indianapolis* and *Spencer*, making *Martinsville* a point, and averring that after he had made the subscription, namely, on the 10th of *May*, 1855, the plain-

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tiff, by the act, preamble and resolution of her board of directors, they having power to do so, permanently located the road on the west side of *White River*, by crossing said river below *Martinsville*, and running on the west side thereof, from such crossing to the town of *Spencer*, making a distance of twenty-five miles, and more than one mile from the line run between *Indianapolis* and *Spencer*,—whereby the defendant is discharged from his liability on his subscription, &c.

To the second paragraph, the plaintiff replied that the road was, at the commencement of the suit, permanently located on the east side of *White River*, and *Martinsville* was made a point. And to the third, she replied by a general denial.

The issues thus made were found for the defendant; and the Court, having refused a new trial, rendered judgment on the verdict.

By the evidence introduced by the plaintiff, it was shown that after the date of the subscription, on the 12th of *October*, 1853, her board of directors, then in session, resolved, "That the road of this company be, and the same is hereby, permanently located on the following line, as reported by the engineer, that is to say: on the line from *Indianapolis* down on the east side of *White River*, on the most eligible route to *Evansville*, inclusive;" that afterwards, on the 4th of *November*, 1854, the board further resolved, "that the road be, and the same is hereby, permanently located from the south line of the corporation of *Indianapolis*, on the west side of the *Bluff* road, and on the line run by the chief engineer, on the east side of *White River*, to *Martinsville*, inclusive."

And *Oliver H. Smith*, being called by the plaintiff, testified that the company was organized under the general railroad law of the state, and he was then her president; that shares of stock are 50 dollars each, and that the road in question has been permanently located within one mile of the line run between *Indianapolis* and *Spencer*, and *Martinsville* has been made a point, as provided in the subscription.

The plaintiff having rested, the defendant, in support of his answer, gave in evidence the following preamble and resolution of the same board of directors, passed *May* 10th, 1855, namely:

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“Whereas, the board at its last session, located the road from *Martinsville* to *Spencer*, crossing *White River* below *Martinsville*, and running on the west side of the river, by *Gosport*, to *Spencer*, upon condition that the citizens of *Gosport* and *Spencer* would subscribe to the capital-stock of the company, within ninety days thereafter, a sum sufficient, in the opinion of her president, to justify such location; and whereas, the conditional stock taken within the time, not being in his opinion sufficient, and a part of said citizens now having presented to this board a subscription of 58,320 dollars upon the last-named condition; therefore, *Resolved*, that said stock be accepted, and that the railroad be, and the same is hereby, permanently located from the point of intersection of the line from *Indianapolis* at *Martinsville* to *Spencer*, by crossing *White River* below *Martinsville*, and running on the west side of the river from the crossing to *Spencer*; and that the engineer is hereby required, when so directed by the president, to locate and plat that part of the road.”

The above was all the evidence touching the main question in the case, namely, whether the plaintiff, prior to the institution of her suit, had, in accordance with the agreement, permanently located her road “on the east side of *White River*, within one mile of the road run between *Indianapolis* and *Spencer*,” having made *Martinsville* a point.

A late writer on railroad law says: “Conditional subscriptions of stock, in the absence of any special prohibition, have been sustained as authorized, and not against public policy. The parties subscribing to them are not to be considered stockholders until the company has performed the condition upon which the undertaking depends; and when that is done, they become stockholders by force of the agreement of the parties, and the subscription becomes absolute.” *Pierce on American Railroad Law*, pp. 70, 71.

This exposition being correct, and we think it is, the de-

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fendant, in the case before us, could not be a stockholder, and consequently, is not liable on the agreement until the plaintiff has performed the conditions upon which the defendant subscribed; and whether in this instance they have been performed, was a pure question of fact, which the jury, in view of the evidence, have settled, and we are not inclined to disturb their conclusion, unless the rulings of the Court, which we will proceed to notice, involve error sufficient to reverse the judgment.

The plaintiff offered to prove by *Oliver H. Smith*, a witness on the stand, first, that the defendant before he subscribed, resided and was a property-holder in *Martinsville*, and that there was a question between the people on the west side of *White River*, between *Indianapolis* and *Martinsville*, and those on the east side, whether the road should not be changed so as to run on the west side of the river, not making *Martinsville* a point; and that the subscription of the defendant was made to induce the location on the east side permanently, and that *Martinsville*, where the defendant resided, should be made a point. Secondly. That the road has not been run and located, and the crossing of the river fixed, between *Martinsville* and *Spencer*, by the engineer, under the resolution of *May 10*; and that the road may, and probably will, run on the east side of the river to *Spencer* from *Martinsville*, before crossing to the west side, and within one mile of the road run between *Indianapolis* and *Spencer*.

The evidence thus offered was refused, and its refusal is assigned for error. As the subscription, so far as it relates to the location of the road between the points named, the side of the river on which it was to run, and the point to be made on the line, is not at all ambiguous, we are unable to perceive any legal ground upon which the first branch of the proposed evidence can be admitted. Parol evidence is admissible to give effect to a written instrument, by applying it to the subject-matter by proving the circumstances under which it was made, whenever without the aid of such evidence the application could not be made in the particular case. 13 Pet. 89. But here no such aid

is required. The instrument itself, when applied to the subject-matter to which it relates, admits of no uncertainty. It says "that the road shall be permanently located on the east side of *White River*, within one mile of the road run between *Indianapolis* and *Spencer*." Hence, extrinsic evidence tending to show that its location on that side was to extend only to *Martinsville*, would plainly contradict the instrument, and could not, therefore, give it effect. Nor do the facts that *Spencer* is on the west side of the river, and that the road, in order to reach that point, must cross the river, produce any uncertainty in the import of the agreement; because it was to be located within one mile of a road previously run, and consequently, was intended to cross the river not more than one mile distant from the point where the previous road crossed it.

The second branch of the refused evidence, is not pertinent to the issues. Proof that the engineer had not acted under the resolution of *May*, 1855, or that the road may, and probably will, run on the east side of the river, from *Martinsville* to *Spencer*, in no respect tends to prove that the defendant has performed her engagement. Indeed, such evidence, if admitted, would induce the conclusion that there is as yet no permanent location of the road. Its rejection could not, therefore, injure the plaintiff.

As we have seen, the resolution of *October*, 1853, located the road on the east side of the river; and had it been shown that that location touched at *Martinsville*, and was within one mile of the road previously run, it would have fulfilled the contract. But the inquiry is, did the road, at the commencement of this suit, stand permanently located, as required by the subscription? If it did not, the action cannot be sustained. In connection with this, we are led to notice the resolution of *May*, 1855. Under the statute to which reference has been made, the company, through her board of directors, had full power to alter the line of road between *Martinsville* and *Spencer*. Now did the resolution produce such alteration? It declares that the railroad be, and the same is hereby, permanently located from

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the point, &c., at *Martinsville* to *Spencer*, by crossing *White River* below *Martinsville*, and running on the west side of the river to *Spencer*. It is true, the distance below the former point is not stated; but the river was to be crossed, and the road was to run on the west side. Hence, it is evident that the resolution did not intend to locate it on the east side, to a point opposite *Spencer*. Indeed, the reasonable construction is, that the road should cross the river not only below *Martinsville*, but as near that place as such crossing could be conveniently effected. It follows that the prior location was in effect annulled by the action of the board in *May*, 1855; and that when this suit was brought the road was permanently located on the west side of the river.

It is needless to inquire what would have been the result, had the plaintiff instituted her suit subsequently to the resolution of 1853, and prior to that of 1855; because, as the case now stands, the location on the east side of the river must be considered as having been temporary and not permanent.

The plaintiff, under the statute, had power to change the location; but the exercise of it in this instance is in conflict with her agreement, and evinces a decided purpose on her part not to perform its conditions. This case stands upon the same ground on which it would have stood had no location ever been made. 7 Blackf. 408.—4 Ind. R. 417.

True, where a subscription of stock in a railroad company is unconditional, the subscriber at once becomes a stockholder, and the company may, without his assent, alter the location of the road, provided the change made does not materially prejudice his rights; but here, the subscription itself binds the plaintiff to make a specified location, and, in effect, stipulates that when made, she will not exercise the power of alteration.

Various errors relative to instructions refused, and to the charge given, are assigned upon the record; but they will not be further noticed, because the verdict is right on the evidence. Indeed, the resolution of *May*, 1855, conclu-

sively proves, that the conditions upon which the defendant made his subscriptions remain unperformed.

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Per Curiam.—The judgment is affirmed with costs.

O. H. Smith, for the appellants.

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W. M. Dunn and *A. W. Hendricks*, for the appellee.

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Suit by a plasterer to enforce a mechanic's lien. The defendant, with his answer, filed these interrogatories: How much of the work was one coat and skim? and how much two coats and skim? Is there any difference, and if so what, between one coat and skim, and two coats and skim? Answer, denying that any part of the work was done with one coat and skim. Objection, that the answer does not state the difference in price. *Held*, that in view of the indefiniteness of the interrogatories, the answer was sufficient.

Where an affidavit for a continuance to obtain testimony alleged due diligence, but it appeared that the witnesses had been subpoenaed on *Saturday* during term, and that the trial was had on the following *Tuesday*; and where the affidavit did not allege a probability of obtaining the testimony by the next term:—*Held*, that the refusal of a continuance was not error.

Where there was no motion for a new trial, the Supreme Court will not look into the sufficiency of the evidence, though it be otherwise properly in the record.

In a suit upon a mechanic's lien, a judgment, in the usual form, for the amount of the finding and costs, closing with a statement that the property described in the complaint is liable to pay the judgment, and ordering the same to be sold as other lands are sold on execution, is sufficient in point of form.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Saturday, May 29.*

HANNA, J.—This was an action for work and labor and materials furnished, and to enforce a mechanic's lien. The complaint was upon an account. The answer was, first, a denial; secondly, that the work was done unskillfully, and the plaintiff had been paid as much as it was worth; thirdly, a set-off. The reply to the second paragraph is a denial, and that the work was done according to the contract between the plaintiff and defendant. To the third paragraph, the reply admitted most of the items, denying some.

Interrogatories were filed with the answer, to be answer-

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ed by the plaintiff. The first point arises upon the answer to the second interrogatory. The plaintiff sued for work as a plasterer. That second question was, as to how much of the work was "one coat and skim," and "how much two coats and skim;" and as to "whether there is any difference, and what it is, in one coat and skim, and two coats and skim, each." The answer says: "I deny having put but one coat and skim on any part of said house"—and then asserts that he put two coats, &c., upon the house.

The objection made to this answer is, that "it does not state the difference in price between one coat and skim and two coats and skim." The Circuit Court held the answer sufficient. We are disposed to believe that decision was correct. The defendant assumes that the plaintiff was required to state the difference in price between the two modes of finishing the work. But such was not the question; it was general—too general to enable the plaintiff to understand to what his answer was to apply, whether to the difference in materials, or in amount of labor, or in price, or in the quality of the work, &c. The question was too indefinite, especially after the defendant expressly stated that no such state of facts existed as required an answer to that portion of it in any form.

The next point made, is upon the refusal of the Court to continue the cause upon the affidavit of the defendant.

The defendant swears he used due diligence to obtain the attendance of certain witnesses; but when we look to the time at which he took legal steps to procure the evidence, we are inclined to think he is mistaken in his conclusion. He took a subpoena on *Saturday* during term. The case was tried on *Tuesday* next thereafter. He states that the witnesses were residents of the county a few days before the making of the affidavit; but does not state the probability of his procuring their evidence by the next term. The affidavit was insufficient.

The next point is, that the evidence is not sufficient to warrant the finding.

Although there is a bill of exceptions copied into the record, purporting to contain the evidence, yet we cannot

consider it, for the reason that no motion was made for a new trial in the Court below. This is necessary to enable that Court to pass upon the evidence.

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1858.

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v.
FLEMING.

The last objection taken to the proceedings, is to the form of the judgment.

The first part of the judgment is in the usual form, for the amount of the finding and costs, and then follows an order that the property described in the complaint is liable to pay and satisfy the said judgment, &c., and that, unless it is paid, said property be sold, as other lands are sold on execution, to satisfy the same.

The statute is, "the Court may, by the judgment, direct a sale of the land and building for the satisfaction of the liens and costs." 2 R. S. p. 183.

There is no error in the form of the judgment.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

J. M. La Rue, for the appellant.

S. W. Telford and *T. Dame*, for the appellee.

GAUL and Wife v. FLEMING.

Action for slander, in charging the plaintiff with larceny. Answer, 1. Admitting the speaking of the words, and justifying. 2. Matter in mitigation of damages. Reply, denying the mitigating facts generally. There was nothing in the complaint charging special damages.

Held, 1. That the words being actionable in themselves, malice is presumed. 2. That the burden of the issue rested upon the defendants; and hence, they were entitled to open and close the argument.

APPEAL from the *Hamilton* Circuit Court.

Saturday,
May 29.

HANNA, J.—This was an action by *Fleming*, a minor, who was permitted to prosecute as a poor person, against *Gaul* and wife, for words spoken by the said wife charging said *Fleming* with larceny.

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The first and second paragraphs of the answer admit the speaking of the words, and justify. The third is as follows:

“The defendants, further answering the first and second paragraphs of the plaintiff’s complaint, say, that before the speaking and publishing the said several words in the said paragraphs mentioned, and therein supposed to have been spoken and published by the said defendant, *Ann Gaul*, of and concerning the said *Elizabeth Fleming*, she, the said *Elizabeth*, admitted and confessed to the said *Ann Gaul* and others, that she, the said *Elizabeth*, had taken and carried away enough muslin belonging to said *Ann* to make her, said *Elizabeth*, a shirt, without the knowledge or consent of the said *Ann*; and the defendants further say that at the time of the speaking and publishing of the said several words in said paragraphs mentioned, by the said *Ann*, she, the said *Ann*, believed the same to be true in fact, and that she declared in the presence and hearing of the same persons in whose presence and hearing said words were so spoken by the said defendant, *Ann Gaul*, as aforesaid, that she had heard and been told the same by the said *Elizabeth Fleming*,” &c.

To these paragraphs of the answer, there was a general denial.

After the evidence had been heard the defendants’ counsel moved the Court for leave, and claimed the right, to begin and conclude the argument to the jury. The Court overruled the motion, and permitted the plaintiff’s counsel to open and close the argument. This is the only point made in the brief of appellants.

The statute upon the subject is as follows:

“In the argument, the party having the burthen of the issue, shall have the opening and closing.” 2 R. S. p. 112. We are not informed by the record as to which party took the burden of the issue in producing the evidence, although we have a very similar statute, to the one above quoted, as to the introduction of testimony.

The question appears to have been first mooted at the

time the argument was to commence. Each party contends that the burden of the issue rested upon them.

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1858.

The paragraph quoted, in effect admits the speaking of the words; and instead of directly denying that they were spoken maliciously, sets up affirmative matter to show such fact, or at least to mitigate the damages.

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FLEMING.

It is argued by the appellants that, although the first two paragraphs of the answer directly, and the last one, thus indirectly, admit the speaking of the words, yet it devolved upon the plaintiff to make proof of the amount of damages sustained, under that clause of the statute which provides that, "allegations of value or amount of damages, shall not be considered as true by the failure to controvert them. 2 R. S. p. 44. There is nothing in the complaint charging special damage, and the words alleged to have been spoken, are of themselves actionable, and, therefore, malice is presumed.

Under these circumstances, we think that, until the defendant had offered evidence to sustain the affirmations in the answer, there was no necessity for the plaintiff to produce any testimony. The general question of damage to the character of the plaintiff, was a question for the jury. Such character is presumed to be good. In the issues tendered, the speaking of the words was admitted. Without evidence from either side, the jury would have been prepared to consider of their verdict.

Evidence to sustain a justification of the speaking, or to mitigate the damages, must have come from the defendant.

The ruling of the Court was erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. Garver and *D. Moss*, for the appellants.

D. C. Chipman and ——— *Evans*, for the appellee (1).

(1) Counsel for the appellee cited the following authorities, touching the *onus probandi*, viz.: 2 R. S. p. 110, § 324; *Id.* p. 112, § 326; *Jackson v. Pittsford*, 8 Blackf. 194; *Jackson v. Hesketh*, 2 Stark. R. 518; 1 Greenl. Ev. § 76. Touching the open and close, they cited 2 Greenl. Ev. § 76; 2 Phil. Ev. p. 483. They contended that the case of *Downey v. Day*, 4 Ind. R. 153, relied upon by coun-

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sol for the appellants, is bad law upon this point, being based upon *Guy v. Kitchener*, cited in 2 Stark. Ev. 826, which case was overruled in *England* by the fifteen judges, in *Carter v. Jones*, 6 C. & P. 64. See 1 Greenl. Ev. § 76, and note 4 to the same.

BENNER v. BENNER.

Suit to enforce the specific performance of a contract for the sale of real estate.

The action was founded upon a title-bond, whereby the obligor agreed to convey the land, on the payment of a certain sum of purchase-money, with interest. The land was held in trust for the obligee, and the bond sued on was made in consideration of that trust. The obligee having died, his widow and sole heir tendered the purchase-money and demanded a conveyance, which being refused, she brought this suit. The Court found for the plaintiff, and adjudged that the defendant convey the premises, &c. The next day after the judgment, the defendant moved the Court to vacate the judgment and grant a new trial, under § 601, 2 R. S. p. 167. The motion was overruled. *Held*, that this was not error; that the case is not within any of the provisions of §§ 592, 601, 611, 612, 2 R. S. art. 29, p. 167.

Saturday,
May 29.

APPEAL from the Posey Circuit Court.

WORDEN, J.—Complaint by the appellee against *John L. Benner*, the appellant, to enforce the specific performance of a contract for the sale of land.

The complaint alleges that the appellant, in *October*, 1847, executed to his brother, *John F. Benner*, his agreement or title-bond, whereby he agreed to convey to said *John F. Benner* a certain piece of land therein described, upon the payment of 147 dollars, 85 cents, with the interest thereon. It is further averred in the complaint, that "said tract of land, the same described in said bond, the said *John L. Benner* held in trust for the said *John F. Benner*, his heirs and assigns, and for his and their use and benefit, and in consideration of said trust, executed the bond aforesaid." It is further averred that *John F. Benner* died, *September* 1, 1853, leaving no children; and that said *Clara*, his widow, is his sole heir, his estate being worth less than 800 dollars; that said *Clara*, on the 21st of *July*,

1855, tendered to said *John L.* the said purchase-money and interest, and a blank deed for said land, and demanded the execution thereof, which was refused. Prayer that said *John L.* might be compelled to convey the land to her; for damages, and other relief.

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BENNER.

To this complaint, the defendant below filed an answer, consisting of seven paragraphs, to the second, fifth and seventh of which, a demurrer was sustained. The others led to issues of fact.

The cause was tried by the Court upon the issues of fact, and there was a finding for the plaintiff below, and judgment. The Court found that the plaintiff below, as widow and sole heir of said *John F. Benner*, was entitled to a good and sufficient deed in fee simple for the premises described, upon the payment to said *John L.* of the sum of 216 dollars, 60 cents, which was then and there paid into Court, for the use of said *John L.*, and the Court thereupon proceeded to order and adjudge that said *John L.* convey the premises, &c.

A motion for a new trial was made and overruled; but the evidence is not before us, and of course we cannot examine as to the correctness of that ruling. The decision of the Court upon the demurrer to the second, fifth and seventh paragraphs of the answer, was not excepted to, and, therefore, no question is before us as to the correctness of that decision.

On the next day after judgment, the defendant below moved the Court to vacate the judgment and grant a new trial, under the provisions of section 601, 2 R. S. p. 167, and offered to pay into Court all costs made in the cause, and to comply with all orders that might be made by the Court pursuant to the statute under which the motion was made.

This motion was overruled by the Court, to which ruling the defendant excepted.

This decision of the Court is assigned for error, and presents the only question before us.

The statutory provisions relied upon, are found in article 29, 2 R. S. p. 166. They are as follows:

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"SEC. 592.—Any person having a valid, subsisting interest in real property, and a right to the possession thereof, may recover the same by action, to be brought against the tenant in possession; if there be no such tenant, then against the person claiming the title or some interest therein."

"SEC. 601.—The Court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom the judgment is rendered, his heirs, or assigns, or representatives, and upon the payment of all costs, and of the damages, if the Court so direct, shall vacate the judgment and grant a new trial. The Court shall grant but one new trial unless for good cause shown."

"SEC. 611.—An action may be brought by any person, either in or out of possession, or by one having an interest in remainder or reversion, against another who claims title to, or interest in, real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining the question of title."

"SEC. 612.—The rules above prescribed shall, in such cases, be observed as far as they are applicable."

The cases provided for by § 592, are for the recovery of the possession, where the party has a subsisting interest in real estate, and a right to the possession thereof.

The 611th section provides for an action by any one having an interest in real property, against another claiming any interest adverse to him, for the purpose of determining and quieting the question of title.

In order to test the correctness of the decision of the Court below, it is necessary to determine, as nearly as may be, the precise character of this action, and thereby ascertain whether it comes within either § 592, or § 611, for if not, § 601 is not applicable to it.

It is claimed that this is a suit by the plaintiff below, as a *cestui que trust*, against the defendant as *trustee*, to determine and quiet the question of title to the property held in trust, and therefore, that it is within the above provisions, and to be governed by § 611, above quoted.

But we do not think the case falls within either of the

provisions above quoted. The substratum of the case is the title-bond set forth in the complaint, and without it, no cause of action whatever, is found in the complaint. It is true, the complaint alleges that said *John L. Benner* held the land in trust and for the use of said *John F. Benner* and his heirs, and that in consideration thereof, he executed the bond; but this fact is only referred to in the complaint, for the purpose of showing the consideration of the bond.

The complaint does not set up any demand, or claim any right whatever, growing out of the trust, either as to the land, or the possession thereof, or the title thereto, or for the performance of the trust, or otherwise. It sets up the bond or agreement executed in consideration of the trust, and prays a specific performance of the agreement, which is adjudged by the Court, on payment of the money mentioned in the bond, and the interest; and we think it is a case simply for the specific performance of a contract. It is evident that the statute above quoted does not embrace cases of specific performance merely, and it follows that the Court below committed no error in overruling the motion.

Per Curiam.—The judgment is affirmed, with costs.

J. G. Jones and *J. E. Blythe*, for the appellant.

A. P. Hovey and *G. S. Green*, for the appellee.

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1858.

THE BOARD
OF COMMISSIONERS OF
WELLS CO.
V.
WEASNER.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY v.
WEASNER.

The Court of Common Pleas has not jurisdiction of an appeal from a decision of a county board under §§ 9, 10, 1 R. S. p. 102.

APPEAL from the *Huntington* Court of Common Pleas. *Saturday,*

DAVISON, J.—This was a proceeding by *Weasner* before *May 29.*
the county board, to obtain an allowance for services, &c.
The following is the cause of action:

May Term, 1858. "Board of commissioners of *Huntington* county,
To *A. J. Weasner*, Dr.

THE BOARD OF COMMISSIONERS OF WELLS CO.
v.
WEASNER. "March, 1855. To guarding jail 24 nights at \$1,00
per night - - - - \$24 00"

Upon the filing of this claim, the board made an order whereby they rejected it, and *Weasner* appealed. In the Common Pleas, the defendants moved to dismiss the appeal for want of jurisdiction; but their motion was overruled, and thereupon, they answered, 1. That the services set forth in the plaintiff's cause of action were done voluntarily, without any contract between him and any one authorized to bind the county. 2. That the services charged were rendered by the plaintiff, for one *Henry Brown*, sheriff of *Huntington* county, and at his request, and not for said county.

The issues were submitted to a jury. Verdict for the plaintiff, upon which the Court rendered a judgment.

The action of the Court, in its refusal to dismiss the appeal, is the only ruling to which exception was taken; hence the question, whether that ruling is or is not correct, is alone presented by the record.

The statute under which the claim was filed, contains the following provisions:

"SEC. 9. No appeal shall lie from the decision of such boards making allowance for services voluntarily rendered, or things voluntarily furnished for the public use.

"SEC. 10. From all decisions for allowances other than those provided for in the preceding section, an appeal may be taken, within thirty days, to the Circuit Court, the party giving sufficient bond against costs, payable to such board," &c. 1 R. S. p. 102.

It is contended that the appellee's claim was for services voluntarily rendered, and that, therefore, no appeal lies. This position is unsustained by the record. The claim, it is true, is general in its terms, still it was competent for the plaintiff to prove on the trial that it was founded in contract, and not for services voluntarily rendered. Indeed, such was the finding of the jury upon the issues which they were sworn to decide.

But whether the services were or were not voluntary, is an inquiry not important in the determination of the case; because, under the statute to which we have referred, the appeal from the decision of the board of commissioners, if at all allowable, should have been taken to the Circuit Court. It follows that the Common Pleas had no jurisdiction, and the motion to dismiss was well taken.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. U. Pettit and C. Cowgill, for the appellants.

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1858.

MAGEE
v.
SANDERSON.

MAGEE v. SANDERSON.

A complaint to foreclose a mortgage must contain a description of the mortgaged premises, and allege that the mortgage was duly recorded in the county where the same are situate.

An answer denying the execution of a written instrument, is not invalid because it is not sworn to; but such an answer excuses proof of the execution of the instrument.

The printed statute-book of another state of the *Union* is not evidence in this state, unless it purports to have been printed under the authority of such state.

10	281
148	456
10	281
153	676

APPEAL from the *Delaware* Circuit Court.

Saturday,
May 29.

DAVISON, J.—Action to foreclose a mortgage. The complaint alleges that one *Elijah Barret*, on the 16th of *April*, 1853, executed to *William Butler* and *Thomas Slocum*, a mortgage, conveying to them a tract of land therein described, as security for the payment of a debt, evidenced by a note amounting to 86 dollars, payable one month after date, with interest at the rate of ten per centum from date; that the contract was made in *Ohio*, and that by an act of the legislature of that state, approved *March* the 30th, 1850, it is enacted “That the parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest, receivable upon the amount of such bond, &c.,

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SANDERSON.

at any rate not exceeding ten per cent. yearly." It is averred that the mortgagees, on the 16th of *April*, 1853, assigned the note and mortgage to *Sanderson*, the appellee; and that subsequent to the making and recording of the mortgage, the mortgagor sold and conveyed the premises to *Magee*, the appellant, who had full notice of the mortgage, &c.

The note and mortgage, or either of them, are not set forth in the pleadings; nor do the same, or copies thereof, appear in the record.

Barret and *Magee* were made defendants. The former, being notified by publication, was called and defaulted. *Magee* appeared and demurred to the complaint; but his demurrer was overruled. Thereupon he answered. The first paragraph of his answer is as follows: "Defendant denies each and every allegation in the complaint. Particularly, he denies that *Barret* executed the note and mortgage; and he denies that there is any such law, act or statute in the state of *Ohio*, as set forth in the complaint, or any law, as therein stated, authorizing ten per cent. interest. To so much of this paragraph, as denies the execution of the note and mortgage, the plaintiff filed a demurrer, which was sustained. And there being issues of fact, the cause was submitted to the Court, who found for the plaintiff, and, having refused a new trial, rendered judgment of foreclosure, &c.

The complaint, it will be seen, fails to allege a description of the mortgaged premises. Hence, it is insisted, that the demurrer should have been sustained. We are inclined to that opinion. The defect pointed out must be held fatal; because, from the statement of the cause of action, the sheriff could not know on what premises to enter to execute the order of the Court. *Whittelsey v. Beall*, 5 Blackf. 143.

But there is another ground upon which the complaint is objectionable. It does not show when or where the mortgage was recorded; and for aught that appears, it may not have been duly recorded in the county where the land

is situate, and hence, not an effective lien on the property when it was conveyed to the defendant. Van Santvoord's Pl. 302.

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1858.

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V.
SANDERSON.

The next inquiry relates to the action of the Court in sustaining the demurrer to a branch of the first paragraph of the answer. The objection is, that the denial of the execution of the note and mortgage is not verified by oath. The code says:

“Where a writing, purporting to have been executed by one of the parties, is the foundation of, or referred to in, any pleading, it may be read in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by pleading under oath.” 2 R. S. p. 44, § 80.

This enactment prescribes a rule of practice, in effect, the same as that prescribed in the revision of 1843, and under that revision it has been often decided that the rule which required a plea to be verified by oath, when it denied the execution of a written instrument, did not render such plea invalid because it was not sworn to. It was deemed to be well pleaded without oath, though it would, when so pleaded, excuse proof of the execution of the instrument. R. S. 1843, c. 40, § 216.—4 Blackf. 417.—1 McLean, 414.—5 Ind. R. 264. This construction, no doubt, applies to the above recited section, and the result is, that the demurrer was not well taken.

During the trial, the plaintiff, in view of proving the law of *Ohio*, fixing the rate of interest, as stated in the complaint, offered in evidence a paper-bound book of 129 pages, and offered to read from its 87th page. On the outside cover of the book is printed “General Laws of the State of Ohio for 1849–50;” and on the title-page the following is printed: “Acts of a General Nature passed by the 48th General Assembly of the State of *Ohio*, begun and held at the City of *Columbus*, December the 3d, 1849, and in the 48th year of the State. Vol. 48. *Columbus*: Printed by *Scott & Bascom*, 1850.” On the 98th page of the book

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there is printed the following: "*Columbus, Ohio, April 19, 1850.* I hereby certify that the foregoing Acts are true copies of the original Rolls now on file in my office. *Henry W. King*, Secretary of State." The book contains an index, and what purport to be the acts of the General Assembly of the state of *Ohio*; but it contains no act relative to printing; nor does it contain any certificate other than the above. The evidence thus offered was, over the defendant's objection, admitted by the Court.

We have a statute which enacts that, "The printed statute-books of the several states, &c., purporting to be printed under the authority of those states, &c., shall be presumptive evidence in all Courts of the legislative acts, public and private, of those states, &c., respectively." 2 R. S. p. 90, § 278. Thus the statute-book of a sister state is not evidence, unless it purports to have been printed under the authority of such state (1). And the inquiry arises, is the book in question within the requirements of the statute? It says that it was printed at *Columbus*, by *Scott & Bascom*, in the year 1850; but it does not show that they had been constituted state printers, or that they had done such printing by virtue of authority derived from the state. There is, indeed, nothing in the description of the book that forbids the conclusion that its printing may have been the result of private enterprise. At all events, the book contained no statement in any degree tending to show that it was printed under the authority of the state of *Ohio*, and it was, therefore, improperly admitted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. March, for the appellant.

T. J. Sample, for the appellee.

(1) See *Comparet v. Jernegan*, 5 Blackf. 375; 1 Greenl. Ev. § 489, and cases cited.

TREW and Others v. GASKILL.

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1858.

TREW
v.
GASKILL.

Where the defendant fails to appear, judgment may be rendered by default, without previously entering a rule for an answer.

Causes pending at the close of a term of the Common Pleas, are continued by operation of law. No order of continuance is necessary.

An affidavit of the non-residency of a party is not bad for not stating the cause of action, or for containing the qualifying words "as the deponent verily believes."

The Court of Common Pleas has not jurisdiction of an action to foreclose a mortgage for 1,000 dollars or more.

APPEAL from the *Clinton* Court of Common Pleas.

Saturday,
May 29.

PERKINS, J.—Suit to foreclose a mortgage for over 1,000 dollars. Judgment for the plaintiff by default.

Several errors are assigned.

The process was returnable on the second day of the term. A rule was taken on the first day for an answer on the second. Later in the same term, an affidavit of non-residency was filed as to two of the defendants.

At the next term of the Court, on the fourth day thereof, publication was proved as to the two non-resident defendants, process shown to have been served on the others, and all, being called, made default, and judgment was rendered against them accordingly.

It is contended that the rule for answer granted on the first day of the term was erroneous. This may be true, but we do not see how the error can vitiate the judgment. As a part of the defendants were not served with process, the plaintiff was not bound to proceed to judgment at that term. He might, at his election, postpone taking judgment till all the defendants were before the Court, at least constructively by notice. *Conwell et al. v. Smith*, 4 Ind. R. 359. It appears that, at the next succeeding term, all the defendants were regularly called and their default entered.

But it is contended that it was error to take judgment by default, without a rule having been entered for answer against all the defendants. The point was settled differently in *Langdon v. Bullock*, 8 Ind. R. 341, and that deci-

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sion has since been followed (1). A rule for answer need not be granted to a defendant who does not appear. It would be a vain thing.

And it is further objected that the cause was not pending at the term at which the default was taken, because no entry of a continuance appears to have been made. It is said the cause was discontinued. But the statute expressly provides that pending cases, at the close of a term of the Court, shall be continued by operation of law. No order of continuance, as to such cases, is required. 2 R. S. p. 8, § 19.—*Id.* p. 21, § 28.

It is suggested also, that the affidavit of non-residency was insufficient, because it did not recite a cause of action, and was, "as the deponent verily believed." We think the affidavit was sufficient. The complaint on file fully disclosed the cause of action. Section 38, 2 R. S. p. 35, it must be admitted, is confused and obscure, but some reasonable construction must be given to it.

Finally, it is insisted the Court had no jurisdiction, the amount decreed being 1,000 dollars and upwards.

The Common Pleas has jurisdiction in civil actions where the amount is less than 1,000 dollars. It has jurisdiction to foreclose mortgages. A foreclosure suit is now a civil action. 9 Ind. R. [560]. See 2 R. S. pp. 6, 18, 176.

The statutes must be construed together.

Per Curiam.—The judgment is reversed. Cause remanded to be dismissed for want of jurisdiction, with leave to withdraw papers below.

J. N. Sims, for the appellants.

J. F. Suit and *J. M. Cowan*, for the appellee.

(1) See *Blair v. Davis*, 9 Ind R. 236; *Blair v. Manson*, *id.* 357; *Archibald v. Lamb*, *id.* 544; *Key v. Robinson*, 8 *id.* 368.

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CARVER v. WILLIAMS.

CARVER
v.
WILLIAMS.

Suit in the Common Pleas upon a promissory note. Answer, that the note was given for real estate; that the vendor gave a bond for a deed on payment, but that he had no title. The bond was neither filed nor copied. Reply, that the obligor could convey "such a title as he undertook to convey in his said bond." The defendant moved that the cause be certified to the Circuit Court, because the title to real estate was in issue. Motion overruled. He then withdrew his appearance. He was called, failed to answer, and judgment was rendered against him by default.

- Held*, 1. That the title to real estate was not in issue; that the pleadings formed no valid, triable issue.
2. That by the statute, the bond, or a copy of it, should have been filed.
3. That if a party appear and plead, and then fail to appear at the trial, his pleadings stand; but if, after pleading, he withdraw his appearance, his pleadings go with it; that without an appearance a party cannot answer, nor can he have an answer standing where there is no appearance.

APPEAL from the *Madison* Court of Common Pleas.Saturday,
May 29.

PERKINS, J.—Suit upon a promissory note.

Answer in two paragraphs—

1. That the note was obtained by fraud.
2. That it was given upon the purchase of a lot of ground; that at the purchase, a bond was given for a deed on payment of the note; and that the obligor had no title, &c. The bond was neither filed nor copied.

Reply—1. Denial of the fraud. 2. Admitting that the note was given on the purchase of the lot mentioned, and that a bond was given; and averring that the obligor could convey, on payment of the note, "such a title as he undertook to convey in his said bond."

Thereupon, the defendant moved that the cause be certified to the Circuit Court, because the title to real estate was in issue.

The Court overruled the motion.

The defendant then withdrew his appearance to the action. He was called, failed to answer, and judgment was rendered against him by default for the amount of the note.

The first question is, was the title to real estate put in issue?

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CARVER
v.
WILLIAMS.

It was held in *Rogers v. Perdue*, 7 Blackf. 302, that, in a suit upon a note, a plea that the note was given for real estate to which a good and sufficient deed in fee simple was to be made on its payment, with an averment that the obligor had no title, followed by a replication affirming title, put in issue the title to real estate. But this is not such a case. The answer does not aver that the bond called for a good title. The Court could not infer from it what kind of deed was required. A quitclaim might have filled the bond. It might not have required the conveyance of the title. A bond calling for *a good deed*, would be construed to mean a deed in fee simple with covenants. A bond simply calling for *a deed*, would not necessarily be so construed. And the replication is, that the obligor could make as good a deed as the bond required of him. These pleadings formed no valid, triable issue. It was wholly uncertain. It was one which the Court, in rendering final judgment, would, under any circumstances, have disregarded. Again, the bond made the foundation of the paragraph of the answer was neither filed nor copied. This the statute required. *Lamson v. Falls*, 6 Ind. R. 309.

The Court was not bound, upon such an invalid issue, to certify the cause to the Circuit Court.

But, if we are wrong in the foregoing views, still, the judgment below cannot be reversed.

If a party appears to a suit and pleads, and then simply fails to appear at the trial, his pleadings stand. But if, after pleading, he comes and withdraws his appearance to the suit, which, by leave of the Court, he may do, his pleadings go with his appearance. Without an appearance, a party cannot answer in a cause. Nor can he have an answer standing where there is no appearance. *Coffin v. The Evansville, &c., Co.*, 7 Ind. R. 413.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. Davis, for the appellant.

R. Lake, for the appellee.

THE STATE on the relation of *GRISWOLD v. DUNN.*May Term,
1858.THE STATE
v.
DUNN.

A bank cannot sue the auditor of state and his sureties, upon his official bond, to recover stocks deposited with him as security for the redemption of its issues, &c., nor for their value, without showing that the object for which they were deposited is accomplished.

Thus, the stocks are for the benefit of the creditors of the bank, and if the officer with whom they are deposited converts them to his own use, or diverts them from the purpose for which they were deposited, the remedy upon his bond is for the benefit of such creditors; and the bank cannot sue for the stocks, or for damages upon the bond, until it has no creditors.

But the successor of such delinquent officer, being charged with the duty of his predecessor, may sue to recover the means wherewith to discharge that duty.

APPEAL from the *Marion* Circuit Court.Saturday,
May 29.

PERKINS, J.—Suit by the state on the relation of *William D. Griswold*, president of the *Great Western Bank*, on the official bond of *John P. Dunn*, late auditor of state, against him and his sureties.

The complaint alleged that *Dunn* had converted to his own use, certain bonds deposited by the bank, pursuant to the general banking law, as security for the redemption of her notes, but contained no averment that the bank had retired her circulation, and no denial that *Dunn* had redeemed it. Indeed, it contained no statement as to the condition of the bank, or its circulation.

The Court sustained a demurrer to the complaint, because it did not show that the bank had been injured, or had any direct pecuniary interest in the suit; and there was final judgment for the defendants.

The plaintiff contends that the Court erred in sustaining the demurrer, inasmuch as the conversion of the securities by *Dunn* was a breach of his bond, for which he must be liable to at least nominal damages.

But admit this to be true, the question still occurs, to whom is he liable? Because a public officer has been guilty of a breach of duty, it does not follow that any or every citizen of the state may sue him for nominal damages.

The general banking law provides that the stocks depo-

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sited as security for the redemption of circulation, shall be held by the officer exclusively for that purpose, till it is accomplished, and then, perhaps, for the security of depositors, &c. Laws of 1855, pp. 26, 36, §§ 13, 13.

The bank, then, cannot sue to recover possession of the stocks, without showing that the object for which they were deposited has been accomplished. Nor can it sue to recover the value of those stocks. The stocks are for the benefit of the creditors of the bank; and if the officer with whom they are deposited converts them to his own use, or diverts them from the purpose for which they were deposited, is not the remedy upon the bond of the officer equally for their benefit, so long as such creditors exist? It would seem that it must be so. If the bank cannot sue for the stocks till it has no creditors, how can it sooner proceed to recover, for its own use, upon the bond of the officer for their conversion?

The successor of the delinquent officer, it should be remarked, being charged with the duty of his predecessor, undoubtedly, might sue to recover the means with which to discharge the duty.

The spirit of the whole act points to the course we have indicated. Thus, section 9 provides that the bank, in the first instance, shall redeem its notes; that on its refusal so to do, the notes shall be protested; that thereupon the auditor shall notify the bank to pay them, and, it failing to immediately do so, that the auditor shall proceed and redeem them out of the proceeds of the bonds deposited; and by section 55, that officer is made liable to an action on his bond for a failure to discharge his duty, which suit may be brought on the relation, and for the use of any person injured.

We think the complaint in this case does not show that the bank had been injured at the time the suit was brought.

Per Curiam.—The judgment is affirmed with costs.

D. M' Donald, for the state.

J. Morrison and *C. A. Ray*, for the appellees.

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LEACH v. LEACH.

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A cause in chancery, brought to issue, hearing and decree upon the merits, under the former practice, will not, upon a reversal of the decree by this Court, be opened for new pleadings or a new trial. Such causes are finally disposed of on the hearing in the Supreme Court.

It is no defense to a suit to obtain relief for a breach of a continuing covenant to allege a former recovery, for a breach of the same covenant; for successive actions may be brought for successive breaches of such a covenant.

And where the complaint, in such case, alleges a continuance of the breach down to the commencement of the suit, and the former suit pleaded was commenced a year previously,—*held*, that the former suit only covered prior breaches, and hence, that the defense did not go to the whole cause of action. And an answer alleging a former recovery for the same cause of action is bad for the same reason.

The covenant alleged to be broken was a condition subsequent to a conveyance of real estate. *Held*, that an answer setting up a former recovery, but failing to allege payment of the judgment, is bad; for it is very doubtful whether an unsatisfied judgment recovered upon breach of a condition subsequent, is a waiver of the right to enforce a forfeiture.

Quære, whether the naked right to take advantage of the breach of a condition subsequent by entry, is subject to sale on execution.

APPEAL from the *Floyd* Circuit Court.Saturday,
May 29.

PERKINS, J.—This was a bill in chancery, filed on the 21st day of September, 1849. The bill alleged that the complainant, *John S. Leach*, and his wife, on the 3d of April, 1834, conveyed to their son, *Jacob B. Leach*, ninety acres of land, on the condition subsequent that he should make a certain provision for them during their lives, and that of the survivor of them. It charges that he had, for a long time, refused, and was still refusing to fulfill the conditions; that the complainants, on the 28th of September, 1848, sued the said *Jacob* at law, and recovered for a breach of said condition, &c. The bill prayed that the conveyance to said *Jacob* might be set aside, &c.

The defendant answered the bill, admitting or denying all its allegations.

Afterwards, at the *October* term, 1850, and on the 19th day of that month, by agreement of the parties, the cause was set down for hearing on the bill, answer, supplemental bill and answer, exhibits, depositions and admissions; and

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v.
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after due deliberation, the Court found that the bill was not sustained, and rendered a decree of dismissal.

The complainant appealed to this Court, and obtained a reversal of that decree. *Leach v. Leach*, 4 Ind. R. 628. In giving their opinion the Court said, that it was clearly established that *Jacob*, the grantee, had failed to perform the conditions subsequent, and had forfeited the estate. The Court then proceeded to state what would be the proper basis of a final decree in the premises, upon the record, and remanded the cause for further proceedings, to be had in accordance with the opinion.

On the return of the cause to the Circuit Court, the defendant claimed the right to file another answer, setting up different grounds of defense from those taken in the first, and to have a trial by jury. The Court refused to permit this, but proceeded to render a final decree upon the basis indicated in the opinion of this Court.

We think the Circuit Court did right.

This, it will be observed, is an old chancery cause, brought to issue, hearing and decree upon the merits, under the former practice. This class of cases, it has not been the course of the Court to open up, upon reversal, to new pleadings, and a new trial; but, on the contrary, it has been the invariable rule to make a final disposition of all such on the hearing here, instead of remanding them for a new trial. *Gale v. Grannis*, 9 Ind. R. 140. Such was, in effect, the former decision in this case.

And if we look into the defenses offered and rejected, so far as they are placed before us by a bill of exceptions, we shall discover that the defendant was not injured by the ruling of the Court.

One of those defenses was contained in a paragraph of the answer, as follows:

That on the 28th day of *September*, 1848, an action of covenant was instituted against him, by the said *John S. Leach*, for a breach of the covenant of support, &c., in which suit a judgment was obtained against him; that the covenant is the same referred to in plaintiff's complaint; and that he has fully paid said judgment.

To this paragraph there are two valid objections:

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1. Though it alleges that the covenant in this and the former suit is the same, it does not allege that the cause of action is the same. And as the covenant is a continuing one, on which successive actions may be brought for successive breaches, the paragraph in no manner shows that the two suits are upon the same cause of action.

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LEACH.

2. The present suit was commenced on the 21st of *September*, 1849, and is, as we have seen, upon a continuing covenant; and the complaint alleges a continuance of the breach of the covenant, down to the commencement of the suit. The former suit pleaded was commenced a year previous, and could only cover prior breaches; and hence the paragraph in the answer setting up the former suit, does not, as appears upon the face of the pleadings, go to the whole cause of action.

Another paragraph of the answer was similar to the above, except that it averred the cause of action to be the same. Still, for the reasons above assigned, it did not answer the whole cause of action.

There was another paragraph similar to the two former, except that it did not aver a payment of the previous judgment pleaded. This is, perhaps, an additional objection. It is certainly very doubtful whether an unsatisfied judgment recovered for a breach of a condition subsequent, of this character, is a waiver of the right to enforce the forfeiture. See *Sanborn v. Woodman*, 5 Cush. 56.

Another of the defenses proposed to be set up was, that the defendant, *Jacob*, had recovered a judgment against his father, the complainant, in a suit for use and occupation of a house situated upon the ninety acres conveyed to him by his father, upon which judgment he had caused execution to issue, and the right of his father in the land to be sold by virtue thereof, he, the son, becoming the purchaser.

In regard to this defense it may be observed—

1. That it is doubtful whether the naked right to take advantage of the breach of a condition subsequent by entry is subject to sale on execution. See *Cross v. Carson*,

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2. In the bill and supplement upon which the cause was originally heard, it was charged that the judgment in question was fraudulent. If it was so, it could have been set aside upon that hearing; and the fact that a sale had taken place upon it would not change the situation of the defendant, *Jacob*, the plaintiff in that judgment, because he himself was the purchaser at the sale. The questions upon the validity of the judgment, the effect of the sale, &c., fairly arose upon the case as first presented, and seem to be included in the former decision of this Court. *Leach v. Leach, supra.*

Per Curiam.—The decree is affirmed with costs.

W. T. Otto and *J. S. Davis*, for the appellant (1).

R. Crawford, for the appellee (2).

(1) Upon the first point stated in the syllabus, counsel for the appellant cited 2 R. S. p. 223, § 799; *Id.* p. 161, § 570; *Williams v. The New Albany, &c., Railroad Co.* 5 Ind. R. 111. Touching the several new defenses set up by the appellant, they cited *The U. S. v. The Bank of the U. S.* 5 How. 382; 4 Rawle, 287, 289; 2 Blackf. 180; 17 Pick. 7, 14; 6 Wheat. 109; 7 Johns. 21; 8 *id.* 284; Com. Dig. tit. Action, K, 3; 3 Edwards, 138; 11 Paige, 414; R. S. 1843, p. 454; R. S. 1838, p. 276; 6 Blackf. 113; 2 R. S. p. 308, § 1; 2 H. Bl. 444; *Jackson v. Varick*, 7 Cow. 238, 244; 8 Yerg. 46; R. S. 1843, p. 751, § 424.

(2) Touching the several new defenses, Mr. *Crawford* cited *Sanborn v. Woodman*, 5 Cush. 56; 4 Ind. R. 629; WALWORTH Ch. in *Stuyvesant v. New York*, 11 Paige, 428; *Modisett v. Johnson*, 2 Blackf. 431; *Hutchins v. Hanna*, 8 Ind. R. 533; *Russell v. Houston*, 5 *id.* 180; *People v. Haskins*, 7 Wend. 463; *Jackson v. Varick*, 7 Cow. 244; *McKissick v. Pickle*, 16 Penn. State R. 140; *Marks v. Marks*, 1 Strange, 129; *Jones v. Roe*, 3 T. R. 88; *Roe v. Griffiths*, 1 W. Bl. 606; 2 Cruise, 39; *Hayden v. Stoughton*, 5 Pick. 528; *Jackson v. Varick*, 7 Cow. 238; R. S. 1843, p. 485, § 1; 2 R. S. p. 308, § 1. Upon the first point stated in the syllabus, he cited 2 R. S. p. 161, § 570.

GATES *v.* MEREDITH.May Term,
1858.• GROVES
V.
SEELEY.APPEAL from the *Decatur* Circuit Court.

Per Curiam.—Suit by *Meredith* against *Gates* for slander. Proper issues being made, the case was submitted to a jury, who found for the plaintiff; and the Court rendered a judgment on the verdict.

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The record contains no bill of exceptions, nor does it appear that any exception, in any form, was taken to the rulings of the Circuit Court. There was no motion for a new trial, or in arrest. The judgment must, therefore, be affirmed.

The judgment is affirmed, with 5 per cent. damages and costs.

A. G. Deavitt for the appellant.

J. S. Scobey and *W. Cumbach*, for the appellee.

GROVES *v.* SEELEY.

APPEAL from the *Hamilton* Court of Common Pleas. Saturday,
May 29.

Per Curiam.—Suit commenced before a justice of the peace. Judgment for the plaintiff. Appeal to the Common Pleas. Judgment there for the defendant.

The controversy in this Court is upon the taxation of costs in the Common Pleas. The plaintiff is not satisfied with it. As he lost his case, he was bound, nothing appearing to show to the contrary, to pay all costs in the Common Pleas and before the justice. But it appears the defendant obtained one continuance in the Common Pleas, which the Court granted at his cost. The defendant, therefore, was bound to pay the costs taxed upon that continuance, the plaintiff the rest.

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We think the plaintiff has no ground to complain of the taxation made.

M'CULLOUGH
v.
THE STATE.

The judgment is affirmed with costs.

D. Moss, for the appellant.

G. H. Voss, for the appellee.

McCULLOUGH and Another v. THE STATE.

In criminal cases, the jury have a right to determine the law as well as the facts.

Saturday,
May 29.

APPEAL from the *Scott* Court of Common Pleas.

Per Curiam.—This was an information for obstructing a highway.

Plea, not guilty. Trial by jury. Verdict and judgment against defendants. Motion for new trial overruled, and exception taken.

At the proper time, the appellants moved the Court to give the jury the following instruction, viz.:

"In criminal cases, the jury have the right to determine the law as well as the facts of the case."

Which instruction was refused, and exception taken. Whereupon the Court gave the following instruction, viz.:

"The jury receive the facts from the evidence, and the law from the Court; but their verdict of not guilty cannot be set aside or overruled by the Court."

To the giving of this instruction, exception was taken.

There was manifest error in refusing the instruction asked for, and in giving the one that was given. *Williams v. The State*, at the present term.

The judgment is reversed. Cause remanded for a new trial.

E. Dumont, *O. B. Torbet* and *P. H. Jewett*, for the appellants.

J. E. McDonald, Attorney General, for the state.

WELLS v. JESSUP.

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COFFIN
v.
HENSCHAW.

APPEAL from the *Allen* Court of Common Pleas.

Per Curiam.—This case is affirmed on the evidence, with 1 per cent. damages and costs.

W. March, for the appellant.

L. C. Jacoby, for the appellee.

Saturday,
May 29.

WAMPLER v. DRYBRED.

APPEAL from the *Madison* Court of Common Pleas. Saturday,
May 29.

Per Curiam.—This was a petition for assignment of dower in certain lands.

There was no motion for a new trial, nor exception to any ruling, judgment or decree of the Court.

There is nothing before this Court in the case.

The judgment is affirmed.

J. Davis, for the appellant.

R. Lake, for the appellee.

COFFIN and Others v. HENSCHAW.

A. sent money to a bank in the form of a draft, with directions to place it to his credit and await his further orders. The banking firm gave a receipt for the same. Afterwards *A.* agreed with *B.* that the draft should be transferred to *B.*'s credit; but the firm was not privy to the agreement, nor did *A.* notify them of it, or make any order in pursuance of it. *B.*, however, without authority from *A.*, wrote to the firm ordering them to place the draft to his credit, and was answered that they had done so. Afterwards, *A.* demanded the money, and the firm refusing to pay it, he brought suit. *Held*, that the firm was liable to *A.* for the amount of the draft.

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COFFIN
v.
HENSCHAW.

Monday,
May 31.

APPEAL from the *Wayne* Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant and others, composing the firm of *Cooper, Lippencott, Coffin, & Co.*, for money had and received by the defendants below, for the use of the plaintiff below.

Process was served on *Coffin*, and a suggestion of not found was entered as to the others. *Coffin*, only, appeared to the action, and judgment was rendered against him only.

The complaint alleges that on the 11th of *December*, 1854, the defendants, by their receipt in writing, acknowledged to one *John Peele*, by the name of *J. Peele*, the agent of the plaintiff, the receipt of a draft on the *Merchant's Bank*, of *New York*, calling for 597 dollars, 29 cents, payable to one *Cox*, and by him indorsed to the plaintiff, to whose credit it was placed by the defendant, as so much money had and received to the plaintiff's use; that the defendants received said sum of money from said bank for the use of the plaintiff, and that the same was duly demanded of the defendants before the commencement of this suit, and payment refused.

The receipt above mentioned is set out as follows, viz.:

"*Phil.*, Dec. 11, 1854.

Mr. *J. Peele*: Yours of Nov. 31 last, came to hand in due time, with the draft enclosed on *Merchant's Bank of New York*, calling for 597 dollars 29 cents, payable to *R. W. Cox*, with instructions to place the same to the credit of *Nathan Henshaw*, of *Indiana*, which amount has been placed to his order, &c. Yours truly, [Signed,]

Cooper, Lippencott, Coffin, & Co."

The defendant *Coffin*, for answer, denied all the matters set up in the complaint.

The cause was tried by the Court, which found for the plaintiff the sum of 522 dollars 15 cents. Motion for new trial overruled, and judgment on the finding. Bill of exceptions filed setting out the evidence.

The reasons filed for a new trial were—

"1. The finding for the plaintiff is contrary to law.

"2. The said finding is against the evidence and not sustained by it."

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It appears from the testimony, that *Henshaw* was entitled to about 600 dollars in the state of *North Carolina*, as the guardian of one *Amos R. Peele*, and that the above-named *John Peele*, as agent of said *Amos R.*, and by the direction of *Henshaw*, as acting guardian of said *Amos R.*, with said money procured the draft in question for 597 dollars 29 cents, payable to one *R. H. Cox*, and by him indorsed to the said firm of *Cooper, Lippencott, Coffin, & Co.*; and that on the 31st of *November*, 1854, the said *John Peele* transmitted the said draft to the said firm, writing them that he sent the draft by the instructions of said *Henshaw*, with directions to place the amount thereof to his credit, and wait his further orders, and that he received from them the receipt above set out.

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HENSRAW.

In *April*, 1855, *Henshaw* gave an order on defendants to one *Joel Parker*, for the amount of said draft, less 100 dollars, which had been arranged in some other way, payment of which order was refused by defendants.

The execution of the above receipt by defendants was proven, and the names of the firm admitted.

This is the substance of the testimony for the plaintiff.

On the other hand, it was proven by one *Nathan Stanton*, that in the spring or fore part of the summer of 1854, *Henshaw* came to him, *Stanton*, and stated that he had 600 dollars in *North Carolina*, as guardian of *Amos R. Peele*, and that he wanted to use some of the money in the purchase of land, and that if he, *Stanton*, would agree to pay him 300 dollars when the man came of whom he expected to buy the land, he, *Henshaw*, would let him, *Stanton*, have a check for 600 dollars from *North' Carolina* on some eastern bank.

The arrangement was accordingly made. The other three hundred dollars was to be paid at some future time, which was not definitely agreed upon. *Stanton* then gave *Henshaw* the name of the firm of *Cooper, Lippencott, Coffin, & Co.*, as the persons for his agent to send the check to, and directed him to have it made payable to them. He

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then wrote said firm stating that they would receive a check for 600 dollars from *North Carolina* from *N. Henshaw*, which was to be placed to his, *Stanton's*, credit.

The man of whom *Henshaw* expected to purchase land did not come, and *Stanton* was not pressed for the 300 dollars (which has never been paid), but *Henshaw* demanded it about the time it was to have been paid, and several times afterwards. In the winter afterwards, *Stanton* paid *Henshaw* 100 dollars on the check and gave him claims to a considerable amount on persons in his neighborhood, requesting him to make what collections he could and retain it on the check. Some time in the latter part of the summer or first of the fall of 1854, *Stanton* received information from said firm that they had received said check for 600 dollars and placed it to his credit. That he was credited by said firm (to whom he appears to have been indebted), with the said sum of 600 dollars in the latter part of the summer or fore part of the fall of 1854. It was the understanding of *Stanton*, that the check spoken of, when received by said firm, was to be at his disposal, and that he was to become paymaster to *Henshaw* for the same. The following receipt was given by *Henshaw* to *Stanton* on the payment of the 100 dollars before spoken of, viz.:

"Received of *Nathan Stanton* one hundred dollars to his credit on a check sent by my direction to *Cooper, Lippencott, Coffin, & Co.*, of *Philadelphia*, 1st mo. 15th, 1855.

Nathan Henshaw."

Henshaw never authorized *Stanton* to write to said firm to place said check or draft to his *Stanton's* credit, nor does it appear that ever *Henshaw* authorized them to do so, or had any conversation, or made any arrangement with them on the subject. *Stanton* says there was no other agreement between him and *Henshaw* than the one before mentioned as having been made in the spring or fore part of the summer of 1854.

It appears that in a conversation between *Henshaw* and *Stanton*, *Henshaw* told *Stanton* that the check was received by said firm and placed to his, *Henshaw's*, credit, and when *Stanton* paid him, it was to be placed to *Stanton's* credit;

and he asked *Stanton* what would be done, as he, *Stanton*, could not raise the money, and that *Stanton* replied, in substance (with that view of the matter), that he, *Henshaw*, should send to the firm and get the balance, having received 100 dollars. This conversation took place between the middle of *January* and *February*, 1855.

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Stanton failed in *February*, 1855, and there was testimony having a tendency to show that for a year or more before that, *Henshaw* distrusted his solvency.

An effort was made to impeach the testimony of *Stanton*, but that was mostly if not totally a failure.

The above are believed to be all the material facts involved in the case.

There is no question made as to the draft named, being received by *Cooper, Lippencott, Coffin, & Co.* as money, and treated as such by them, and of course we raise none in that respect.

It is insisted, however, that, under the facts disclosed by the testimony, the firm, upon the receipt of the draft, became the debtors of *Stanton* and not of *Henshaw*, and that they are not liable to *Henshaw*; that the draft really belonged to *Stanton*, by virtue of the agreement between him and *Henshaw*. But we do not think the evidence sustains this position.

The money belonged to *Henshaw*, in his fiduciary capacity, and it was sent to the firm, in the form of the draft, with directions to place it to his credit and await his further orders, which was done by the firm. As between *Henshaw* and the firm, there does not appear to have ever been any understanding that it should be placed to the credit of *Stanton*, nor did *Henshaw* ever authorize *Stanton* to direct the firm to place it to his credit.

These facts would, of course, make the firm liable to *Henshaw* for the draft, and we do not think that liability at all affected by the fact that *Henshaw* had agreed with *Stanton* to let him have the draft, and that *Stanton* had furnished the name of the firm to whom the draft should be sent, and had written the firm advising them that they would receive the draft from *Henshaw*, to be placed to his,

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v.
LYNDE.

Stanton's, credit. The real question is, to whom did the firm become indebted upon the receipt of the draft? Very clearly, to *Henshaw*, as it was received from him through *J. Peele*, by his direction, and placed to his credit. This liability of the firm to *Henshaw*, was not discharged by the agreement between *Henshaw* and *Stanton*, to which the firm was in nowise privy.

Upon the receipt of the draft by the firm, they became liable to only one of these persons for the amount of it. That liability was not to *Stanton*, as it belonged to *Henshaw* (the title not having passed by his agreement to let *Stanton* have it); it was received by the firm as *Henshaw's*, and he was credited with the amount of it.

In order to discharge the liability to *Henshaw*, there must have been some agreement, express or implied, that the firm should become debtor to *Stanton* instead of *Henshaw*, and that the credit should be transferred to *Stanton*; and this contract should be of such a character as to render the firm liable to *Stanton* for the draft.

No such agreement is shown to exist in the case. We regard as immaterial, the fact that the firm gave *Stanton* credit for the draft in the settlement of their claims against him, as it does not appear from the evidence that they had any authority from *Henshaw* to do so.

The finding appears to have been in accordance with the evidence, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

G. W. Julian and *J. B. Julian*, for the appellants.

J. Perry, for the appellee.

COYNER v. LYNDE, and Another.

Where the evidence is not in the record, the verdict of a jury will not be disturbed by the Supreme Court, except in extreme cases.

Where a party abandons his contract, the opposite party has his election to sue or make a new agreement; and if in such new agreement he make new

or additional promises, dependent upon the performance of the work contracted for, and the party abandoning the original contract, in consideration of such new promises complete the work, the promises are binding.

Such new agreement may by its terms, or by legitimate implication, dispose of any right of action arising under the previous contract.

Instructions given to the jury, if not in themselves erroneous under a supposable state of facts, will, in the absence of the evidence, be presumed to be correct; and instructions refused will, in that state of the record, be presumed to have been incorrect.

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APPEAL from the *Wayne* Circuit Court.

Monday,
May 31.

HANNA, J.—The appellant was the plaintiff, and the appellees the defendants. The plaintiff was a contractor with the *Richmond and Newcastle Railroad Company*, for the construction of a portion of said road. The defendants undertook, and agreed with the plaintiff, to complete a portion of that contract, to-wit, to grade the road, for which they were to receive from the company the same rates per yard, &c., that the plaintiff was to have received, and said defendants were to pay the plaintiff a certain portion of the sum so received, to-wit, so much per yard, &c., as a premium, or for the privilege of said contract. This suit is for that sum, which was to have been thus paid by defendants to plaintiff.

The Court overruled the demurrer to the sixth paragraph of the defendants' answer, and gave and refused certain instructions directed to the points involved in that paragraph. Of these rulings the plaintiff complains.

The sixth paragraph is, in substance, that after the plaintiff and defendants had entered into the agreement sued on, it was ascertained that the prices at which plaintiff had undertaken with the company to do the work, were greatly inadequate; that it would be a losing business to prosecute the work; that upon such discovery, the defendants determined to abandon the contract, and leave the plaintiff to perform it; that the plaintiff, knowing he would suffer loss to complete the same himself at the prices, "in view of said facts, and to induce the defendants to go on with said work, and not throw the same on the hands of said plaintiff, he, said plaintiff, agreed that if said defendants would agree to continue to prosecute said work to

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final completion, and procure additional and extra pay from said company, which, with the amount agreed to be paid plaintiff, would enable them to complete said work, and save him from prosecuting the same, he, the said plaintiff, then and there agreed to release and acquit them from said payment, &c.; that relying on this promise, and an agreement of the company to pay them an additional compensation, they completed said work.

It is insisted by the plaintiff that there was not, nor is there alleged to be, any consideration for this new promise, and it was therefore void; whilst, by the defendants, it is argued that the contract was, in effect, abandoned, and the work afterwards resumed because of the new promise, and that such resumption of work was a sufficient consideration for the new agreement to pay a different sum, to-wit, the whole, instead of a part, of the original contract price.

Whether the contract between the plaintiff and the defendants was abandoned or not, by the defendants, was a question to which the attention of the jury was fairly called by the instructions, and the law stated to them upon such a state of facts, if found. Under these circumstances, we cannot disturb their finding, especially as the whole evidence is not in the record. *Mills v. Riley*, 7 Ind. R. 138.

From the verdict of the jury, it is evident that they must have come to the conclusion that the contract had been abandoned. If it was abandoned, the plaintiff had his election, either to sue the defendants for non-performance, or to obtain the completion of the work by a new arrangement. If, in making such new arrangement or agreement, new or additional promises were made to the defendants, dependent upon the completion of the work, and the defendants, in consideration of such promises, completed the work, we do not see anything to prevent such promises from being binding. *Monroe v. Perkins*, 9 Pick. 302.—14 Johns. 330. Such new agreement might embrace in its terms, and definitely or by legitimate implication dispose of, any right of action which the plaintiff had, under the previous contract, against the defendants for failure to perform, or for portions of the sum due for work done, so

far as it had progressed. 4 Ind. R. 75.—7 *id.* 597. Whether a new agreement was made, and if so, whether the defendants were absolved thereby from the payment of the *bonus* previously agreed upon, were also questions of fact for the jury, and were, so far as we can see, properly submitted to them, and we cannot disturb their verdict thereon.

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In the case cited in 14 Johns., the plaintiff undertook by agreement under seal, to construct a certain cart-way for the sum of 900 dollars. After progressing with the work, he ascertained that the price was inadequate, and determined to abandon the contract; whereupon the defendant agreed verbally to release him from the contract, and pay him by the day, if he would complete the work, which he did; and in a suit for work and labor, the second contract was considered binding. So the case in 9 Pickering was for work and labor, &c., in the erection of a hotel. Defense, a special contract, &c. Reply, waiver of the contract, and new promise, &c. And although, so far as can be gathered from the opinion, the evidence of an abandonment of the original contract was not by any means strong, yet the verdict of the jury is adverted to as settling that question. See, also, 7 Ind. R. 138.

As the evidence is not in the record, the presumption which we have often decided would arise in reference to instructions given and refused, would prevent us from saying that the instructions given in this case were improper; and so, also, as to the ruling of the Court in refusing those that were asked. 9 Ind. R. 115.—*Id.* 230.—*Id.* 286.—8 *id.* 502.—7 *id.* 531.

Per, Curiam.—The judgment is affirmed with costs.

O. P. Morton, C. H. Test and J. M. Wilson, for the appellant.

W. A. Bickle, for the appellees.

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THE BOARD
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v.
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THE BOARD OF COMMISSIONERS OF VERMILLION COUNTY
v. POTTS, Sheriff.

THE SAME v. BELL, Clerk.*

10	286
139	366

Section 25 of ch. 20, 1 R. S. 1852, providing for allowances by county commissioners to clerks, sheriffs, &c., for extra services, is repealed by §§ 5 and 35, ch. 49, Acts of 1855.

An appeal lies from the decision of a county board upon a claim by a county officer for extra services under the statute of 1855, as from any other judicial decision of such board.

Monday,
May 31.

APPEAL from the *Vermillion* Circuit Court.

HANNA, J.—*Potts* presented his claim to the appellants for allowance for extra services as sheriff of said county. The appellants allowed about one-third of the claim; the residue was not allowed. *Potts* appealed to the Circuit Court. The commissioners there moved to dismiss the suit, and also to dismiss the appeal, each of which motions was overruled. These rulings of the Court are assigned as errors.

It is urged that the board of commissioners had no jurisdiction, nor had the Circuit Court, to consider, hear and determine anything in reference to the claim filed by *Potts*; because it was not subscribed and sworn to by him. We are referred to the following statute:

“Such commissioners shall annually allow the clerk of the Circuit Court, sheriff and auditor, an annual compensation for all extra services as such, not exceeding one hundred dollars each; but such allowance shall not be made to any such officer, until he shall file a detailed statement of his charge, with items and dates, to the truth of which he shall take and subscribe an oath; which allowance shall be in discharge of all compensation for all extra and other

* *Bell*, as clerk of the Circuit Court of the county of *Vermillion*, filed a claim before the board of commissioners for extra services, a portion of which was allowed. *Bell* appealed to the Circuit Court. There, the same motions were made, and the same points arose, as in *Potts's* case.

The counsel were the same in both cases.

services where no certain fee is fixed by law." 1 R. S. p. 229, § 25.

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By the appellee, it is insisted that the above section is repealed by the act of 1855. The latter clause of § 5 of that act is as follows: "Clerks and sheriffs shall be entitled to receive such reasonable allowance for extra services as the board of county commissioners may think right and proper, to be paid out of the county treasury." And § 35 of the same act (p. 115), says: "The act entitled 'An act regulating the fees of officers,' approved *June* 16th, 1852, and all former laws in conflict with this act, or any part of it, be and the same are hereby, repealed."

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Is the section first above quoted, or any part of it, repealed by this latter act? Can the decision of the board of commissioners, in such case, be appealed from? These are points raised by the parties in this case.

Upon a comparison of the two statutes, it will be seen that the act of 1852 limited the amount to be allowed for extra services to not exceeding 100 dollars; that of 1855 has no such limitation. That of 1852 made the allowance a discharge for "all extra and other services where no certain fee is fixed by law;" that of 1855, so far as the compensation of clerk is concerned, contains this clause: "For all services not specifically provided for in this act, the clerk shall be allowed the same fees as are by law allowed for similar services;" and as to sheriffs, the following clause: "In criminal cases, not provided for, the like fees as for services in civil cases."

These quotations from the two statutes, will show, at a glance, that there is such conflict as cannot be reconciled, and that without doubt the act of 1855 directly repealed that of 1852, as to the amount of compensation which may be allowed out of the county treasury, and, we think, by implication, as to the manner in which such claim should be presented. The term "extra service" included more under the law of 1852, than under that of 1855. An allowance for such extra service under the law of 1852, discharged any claim, upon the part of the officer, for a certain class of services, for which, under the law of 1855, he

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obtains like fees as for similar services. The statutes are so essentially different, that the latter repealed the former. 6 Ind. R. 148. By the second section of the act of 1852 "regulating the fees of officers," allowances to clerks or sheriffs payable from the county treasury, for extra services, were forbidden where the fees per annum amounted to more than 1,000 dollars. The repeal of this portion, and the essential modification of other portions, of the statute, would appear to indicate the intention of the legislature to entirely reform the statute in reference to fees of officers.

Where a new statute covers the whole subject-matter of an old one, and is repugnant to the former, it, by implication, repeals the old act, as a general rule. 13 How. (U. S.) 429, 19 Curtis, 575.

As to the second question, we are of opinion an appeal clearly lies, and that the action of the county board is not, as insisted, final. This cannot be classed among voluntary allowances; for it is but a mode of payment for certain services rendered by public officers, for which remuneration is not otherwise provided. The officer has, by the statute, a claim against the county for such services; and if the proper authority refused to pay him a reasonable amount, and no appeal lies, he would then be in possession of a right without the power to enforce it. "In vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld." 1 Blac. Com. 56.

The claim is presented to the board of commissioners; and from the decision of that tribunal an appeal lies under § 31 of the act providing for the organization of such board (1 R. S. p. 229), as from any other judicial decision of that body.

Per Curiam.—The judgment is affirmed with costs.

S. F. Maxwell, for the appellants.

T. C. W. Sale, for the appellees.

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1858.

THURSTON and Another v. BARNES.

THURSTON
v.
BARNES.

A sheriff's return to an execution levied upon real estate, is admissible in evidence to prove the levy, sale and payment of the purchase-money, though it does not affirmatively state that the property was appraised.

The fact that the return states that the property was sold to the highest bidder, does not admit the inference that there was no appraisement.

It is only when property levied upon remains unsold, that the sheriff is required to return the appraisement with the execution; and even then, it need not be indorsed on the execution.

Where the property is sold, and the return does not show that it was appraised, an appraisement may be proved.

Where the rents and profits for seven years were offered, and there was no bidder,—*held*, that the sheriff was not required to offer a shorter term. *Aliter*, if he had received a bid.

APPEAL from the *Gibson* Circuit Court.Monday,
May 31.

DAVISON, J.—This was an action by *Moses Barnes* against *Sarah Ann Thurston*, for a lot of ground in *Princeton*. The facts set up in the defendant's answer, are substantially these: In *April*, 1854, the defendant was married to *William Thurston*, who afterwards bought the lot in contest of *John Lagow*, for 400 dollars. He paid 100 dollars in hand, and for the residue gave two promissory notes, each for 100 dollars, one note payable *December 20*, 1854, and another due on the 20th *December*, 1855. He received *Lagow's* bond for a deed upon payment of the purchase-money. In *August*, 1854, the defendant filed her bill in the *Gibson* Circuit Court against her then husband, the said *William*, for divorce and alimony, which Court, at its *March* term, 1855, granted the divorce, and rendered a decree for alimony in her favor and against him, for 500 dollars. The sheriff, by virtue of an execution issued on the decree, levied upon the lot, advertised it for sale, and, on the 18th of *August*, 1855, sold the same, at public auction, to her, *Sarah Ann*, for 52 dollars, and made her a deed pursuant to the sale. During the pendency of the suit for divorce and alimony, viz., on the 3d of *January*, 1855, *William Thurston* paid to *Lagow*, before it was due, the residue of the purchase-money, and procured him to execute a deed to *Barnes*, the

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plaintiff in this suit, for the lot in controversy. It is averred that *Thurston* procured the deed to be made to *Barnes*, and he agreed to receive it, with intent to cheat and defraud her, *Sarah Ann*, out of any judgment she might recover in her suit for divorce, &c.

There was a reply in denial of the answer.

The issue was submitted to a jury, and upon the trial, the defendant having given in evidence the decree and execution referred to in the answer, offered in evidence the sheriff's return, indorsed on the execution, which indorsement is as follows:

"Levied, *July 21, 1855*, on lot 57, in *Princeton*; and having advertised the lot, as required by law, I did, on the 15th of *August*, in said year, expose the same for sale, at the door of the court-house in the town of *Princeton*. Having first offered the rents and profits of said lot for the term of seven years, and no one bidding therefor, I then offered for sale, to the *highest bidder*, the fee simple of the lot, and *Sarah Ann Thurston*, having bid for the same 52 dollars, and that being the highest and best price bid for the lot, it was openly struck off to her for that sum, and thereupon a conveyance was made to her for the property," &c.

The evidence thus offered was resisted on two grounds—

1. The return shows that the lot had been sold to the highest bidder without appraisement.

2. It appears that the sheriff offered for sale the rents and profits for seven years, without having first offered the same for a less term.

The Court, upon the first ground of objection, refused to admit the evidence; and thereupon the defendant's counsel announced that the return being refused, the defense could not be sustained.

There was a verdict for the plaintiff; and the Court, having overruled a motion for a new trial, gave judgment, &c.

The return does not show affirmatively that the property was sold without appraisement. Nor does the mere fact that it was offered for sale to the highest bidder, allow a decisive inference that it was not appraised. It is only

when property levied on remains unsold, that the sheriff is required to return the appraisement with the execution; and even then it is not essential that the fact of such appraisement should be noted in the return indorsed on the execution. 2 R. S. p. 138, § 453. It has been decided that "the title of a purchaser of real estate at sheriff's sale, who pays the purchase-money and receives the sheriff's deed, cannot be affected by the circumstance that the return of the execution was imperfect or that there was none made." 7 Blackf. 154. Suppose that, in this instance, there had been no return, still the defendant would have been allowed to prove an appraisement. Hence, there seems to be no reason why an appraisement is not provable, though the return on the execution does not show that it was made. The return, in our opinion, was admissible to prove the levy, sale and payment of the purchase-money, allowing the defendant to prove the appraisement by other legitimate evidence.

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The second ground of objection is equally untenable. The statute requires the rents and profits for a term not exceeding seven years to be first offered, and that so many years, not exceeding such term of seven, shall be sold, as will satisfy the execution, and no more. 2 R. S. p. 140, §§ 463, 465. Here the return avers that the rents and profits for seven years were offered, and there was no bidder; hence a bid for a shorter term could not have been expected; and it was, therefore, needless to have proceeded further in an effort to sell the rents and profits. If the sheriff had received a bid for the full term, it would then have become his duty to have offered a shorter term.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Baker, and *J. T. Embree*, for the appellants.

J. G. Jones and *J. E. Blythe*, for the appellee.

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INDIANA CENTRAL RAILWAY COMPANY v. GAPEN.

INDIANA CENTRAL RAILWAY CO.
v.
GAPEN.

On appeal to the Circuit Court from a judgment by a justice of the peace, against a railroad company for killing stock, a judgment for double damages and a docket-fee, under § 3 of the act of *March 1, 1853*, is erroneous.

In a suit against a railroad company to recover damages for stock killed by their cars, at a point on their road where a highway had been established, which highway, though shown to have been abandoned by the public for two years, was not shown to have been vacated, the plaintiff must prove misconduct or negligence on the part of the company or their agents.

Monday,
May 31.

APPEAL from the *Hancock* Circuit Court.

DAVISON, J.—*Gapen* sued the railway company before a justice of the peace, to recover the value of a cow, which is alleged to have been killed by a locomotive of the company, while running on their road. Before the justice, the plaintiff recovered 25 dollars. The defendants appealed. The Circuit Court, to which the appeal was taken, assessed the plaintiff's damages at 25 dollars; and having refused a new trial, rendered a judgment in his favor for 50 dollars, double the amount assessed, and for a docket-fee of five dollars, &c.

This judgment is founded on § 3, of an act approved *March 1, 1853*; and so far as it relates to double the amount assessed, and the docket-fee, must be held erroneous, because we have decided that that section is in conflict with the constitution. *Madison, &c., Railroad Co. v. Whiteneck*, 8 Ind. R. 217.—Acts of 1853, p. 113.

The evidence is set out in the record, and was substantially as follows: The cow was killed on the defendants' railroad, at a place where its track had been crossed by a state road, which had been used and worked as a public highway for fifteen years prior to the construction of the railroad. About two years before the killing occurred, the state road had been removed, so as to cross the defendants' road a short distance east of the point where the cow was killed. It was not shown that such removal was authorized by any competent authority. During said two years, the state road had been abandoned by the traveling public, and was, at the time the cow was killed, used by one

Smoot, as a lane to pass his stock from his house, on the north side of the railroad, to his pasture, on the south side—he, *Smoot*, being the owner of the land on both sides of the lane. Plaintiff had hired *Smoot* to pasture his cow, and in passing along the lane from the pasture to the water, near *Smoot's* house, she was killed. The cow could get to the water no other way, except along the lane, which was closed at both ends on *Smoot's* land, and kept by him for his own use. The railroad track is not fenced, nor was it shown that the destruction of the cow resulted from the negligence or willful misconduct of the defendants, or their agents, &c.

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WAY CO.
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The railroad not being fenced, the plaintiff would have been entitled to recover, without regard to the question whether the killing was the result of willful misconduct, or negligence, or unavoidable accident, unless the animal was killed at a place on the defendants' road where they could not rightfully erect a fence. Acts of 1853, p. 113, §§ 2, 3.—*The Lafayette, &c., Railroad Co. v. Shriner*, 6 Ind. R. 141. Here, the accident occurred at a point on the railroad where a state road had been established, and had been used as a public highway; and there was no evidence in any degree tending to prove that it had been vacated in any mode prescribed by law. It is true, the traveling public had abandoned it during a period of two years; but, unless it was removed by competent authority, their right to resume its use could not, it seems to us, be successfully questioned. We must, therefore, in the absence of direct proof of the state road having been legally changed, presume that it existed at the time when, and place where the animal was killed. This conclusion brings the case at bar within that of *The Lafayette, &c., Railroad Co. v. Shriner, supra*. The company could not lawfully fence their road at the place where the accident occurred. And the result is, the want of such fence cannot be held to excuse proof of willful misconduct or negligence of the defendants or their agents (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

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H. C. Newcomb, J. S. Harvey and C. H. Test, for the
appellants.

STOCKTON

v.
GRAVES.

(1) See notes to *The Indianapolis, &c., Railroad Co. v. Caldwell*, 9 Ind. R. on p. 400, for cases.

STOCKTON v. GRAVES.

A deposition taken *de bene esse*, wherein the witness stated that he resided in a certain county, but that he was about to leave the state, may be admitted in evidence, upon proof that the deponent has not returned to his residence.

The question whether pencil-marks made on a note indicate its cancellation, is properly for the jury; for it could not be said, as a point of law, that such marks imported a cancellation of the note.

Suit upon a note and account. Answer, a set-off for damages done by plaintiff to defendant, while tenant on defendant's farm, in farming the land in an unskillful manner. *Held*, that the set-off was bad on demurrer; the terms of the contract of renting should have been set out, and the acts of omission specified.

In a set-off, the claim for damages should be set out with as much certainty, as in a cross action for them.

Monday,
May 31.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—Suit upon a note and an account. Answer in three paragraphs:

1. General denial.
2. Payment of the note.
3. A set-off, reading as follows:

"To damages done by said plaintiff to said defendant, in farming land in an unskillful manner, while plaintiff was tenant of defendant, on his farm on *Pretty Prairie*, being the east, &c., during the year from *March* 1st, 1853, to *March* 1st, 1854, - - - - - \$175.00

To like damages for the year from *March* 1st, 1854, to *March* 1st, 1855, - - - - - 198.00

Demurrer sustained to this paragraph. Issues of fact upon the others. Trial and judgment for the plaintiff.

The deposition of a witness, taken *de bene esse*, was

permitted to be read. The witness stated in his deposition, that his residence was in *Tippecanoe* county, but that he was about to leave the state, &c. It was proved that he had not returned to his residence. This raised a presumption that he was still absent from the state. His deposition was rightly admitted.

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V.
GRAVES.

A witness testified to admissions of the defendant. It is claimed that the testimony was improper, because the admissions were made in an attempt to compromise. But the admissions proved were not made for the sake of a compromise, nor as a part of one. They clearly were admissible. *Cates v. Kellogg*, 9 Ind. R. 506.

It was claimed that certian pencil-marks on the note sued on, indicated that it had been canceled. The jury inspected the note, heard the evidence touching the marks, and the payment of the note, and, from the whole, found that it was not paid. The question was properly left to them, as it could not be said, as a point of law, that the marks imported a cancellation of the note.

Upon the weight of the evidence, the Court cannot interfere with the judgment.

The only difficult question in the case, is that arising upon the demurrer to the set-off.

Our statute enacts that a set-off must arise "out of a debt, duty or contract, liquidated or not;" that is to say, unliquidated damages may be set off, where they arise out of a debt, duty or contract. 2 R. S. p. 39, § 57. They may also be set up by way of recoupment or counter-claim. *Id.* p. 41, § 59.

It would seem, then, that where a party was sued touching the subject-matter of a contract, he might set up, by way of counter-claim in such suit, any demand he might have for unliquidated damages, growing out of such contract; while, if not sued on that contract, but some other, then he might set up by way of set-off, his claim for damages growing out of the former contract, in the suit upon the second. In other words, the same matter may be set up as a counter-claim in a suit upon the contract, or as a set-off, in a suit upon another contract. But, however

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this may be, and we do not feel disposed in this case, to make a conclusive decision upon it, we think the demurrer was rightly sustained in this case, on account of the insufficient statement of the set-off.

The terms of the contract of renting should have been set out, that the Court might have judged how far it required the tenant to go in husband-like farming; and then the acts of omission should have been specified, that the Court could have judged whether they were violations of the lease. The claim for these damages should have been set out with as much certainty, as would have been requisite in a cross action for them.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

S. A. Huff, Z. Baird and J. M. La Rue, for the appellant:

W. C. Wilson and G. Gardner, for the appellee.

PATTERSON and Another v. THE STATE.

In a suit upon a forfeited recognizance, where judgment was taken *nil dicat*, it cannot be objected on appeal that the recognizance was defective.

By the statute, the plaintiff or relator, in a suit upon a defective recognizance, may suggest the defect in his complaint, and recover to the same extent as if the recognizance were perfect; and the failure to make such suggestion in the first instance, can always be cured by amendment.

In this case, the sheriff's deputy returned the recognizance thus: "Taken and approved by me, this 20th day of October, 1852. *Wm. J. McIntosh*, sheriff; by *John Cole*, deputy."

Held, 1. That the return was good.

2. That if the defendant wished to put in issue the deputy's authority, he should have raised his objection by answer.

Where there is a good complaint, the name of the action is immaterial. An objection to a matter of form, is waived by proceeding in the cause without raising the objection.

Monday,
May 31.

APPEAL from the *Greene* Circuit Court.

PERKINS, J.—Suit upon a forfeited recognizance. The recognizance reads thus:

“ Know all men by these presents that we, *James W. Mc-* May Term,
Allister and *Thomas Patterson*, acknowledge ourselves to 1858.
 owe and be indebted unto said state, in the penal sum of PATTERSON
 500 dollars, to be levied of our goods and chattels, lands V.
 and tenements, if default be made in this condition, to- THE STATE.
 wit:

“ The condition of this recognizance is such, that if the said *James Wesley McAllister* will well and truly appear before the judge of the *Greene* Circuit Court, on the first day of the term of the Circuit Court to be held at *Bloomfield* in *Greene* county, *Indiana*, and then and there answer the state of *Indiana* on a charge of grand larceny, and also then and there abide the order and determination of said Court, and not depart without leave thereof, then this recognizance to be null and void, otherwise to be and remain in full force and virtue in law and equity.

“ Witness our hands and seals, this 19th day of *October*,
 1852. [Signed,] *James W. McAllister*, [SEAL.]
Thomas Patterson, [SEAL.]”

“ Taken and approved by me, this 20th day of *October*,
 1852. *Wm. J. McIntosh*, sheriff, by *John Cole*, deputy.”

The recognizance is set out, in *hæc verba*, in the complaint which is called, and is in the form of, a *scire facias*.

The suit was instituted after the 6th of *May*, 1853. The complaint, or *scire facias*, set out the charge, the writ, the taking of the recognizance, its forfeiture, &c.

The defendants appeared, pleaded, appeared again, withdrew their plea, but not their appearance, and suffered judgment *nil dicit*.

The appellants seek to reverse that judgment on these grounds:

1. That the recognizance is defective.
2. That it appears to have been taken by a deputy, and there is no averment that the deputy had been legally appointed.
3. That the suit should have been an action of debt, pursuant to § 48, 2 R. S. p. 366, and not a *scire facias* on the recognizance.

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To the first objection, if true in point of fact, the following section of the statute is a complete answer:

"No official bond entered into by any officer, nor any bond, recognizance or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance, or recital, or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance, or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance, or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance, or written undertaking were perfect in all its parts." 2 R. S. p. 213, § 790.

• The failure to make any such suggestion in the first instance, could always be cured by amendment.

As to the second objection, the return is made precisely as it should be, when a recognizance is taken by a deputy. Gwynne on Sheriffs, 450. See 2 R. S. p. 11, § 4. And if the defendant wished to put in issue the deputy's authority, in the given case, to serve the writ and take the recognizance, he should have raised the objection, at all events, by answer. See *Allen v. Thaxter*, 1 Blackf. 399; *Thomas v. Reister*, 3 Ind. R. 369. Perhaps he should have moved, in the first instance, to have been discharged from arrest.

But suppose the service was by a special deputy, appointed simply to execute the writ in the given case. See *The New Albany, &c., Co. v. Grooms*, 9 Ind. R. 243.

The third objection goes to a mere matter of form, or name. The *scire facias* contains all the allegations of a good complaint. It is not material by what name the action is called. A mere matter of form is waived by proceeding in the cause below without raising the objection.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

H. L. Livingston and *I. Blackford*, for the appellants.

D. C. Chipman, for the state.

KELLY v. HOCKET and Others.*

May Term,
1858.KELLY
v.
HOCKET.

Suit in the Common Pleas upon promissory notes. The defendant answered denying the jurisdiction of his person, because he was a brother of the judge. Upon a review of the statutes, *held*, that the objection should have been taken by way of application to change the venue.

Held, also, that the fact that it was the defendant—the party objecting—to whom the judge was related, made no difference.

APPEAL from the *Grant* Court of Common Pleas.

Monday,
May 31.

PERKINS, J.—*Hocket, Lomax and Willcuts*, sued *David Kelly*, in the *Grant* Common Pleas, on promissory notes amounting to about 170 dollars. The defendant answered denying the jurisdiction of the Court over his person, because he was a brother of the judge of said Court. A demurrer to the answer was sustained; and, the defendant refusing to answer further, judgment was given against him for the amount of the notes.

The only question is, whether the Court erred in sustaining the demurrer to the answer.

At common law, interest disqualified judges and jurors. *Commonwealth v. Ryan*, 5 Mass. R. 92.—*Hill v. Wells*, 6 Pick. 108.—*Trullinger v. Webb*, 3 Ind. R. 198.

In this state, it would seem that the disqualification must be declared by the constitution, or by statute.

We have not observed that the constitution specifies any grounds of incompetency on the part of judges. It declares that in every criminal case, the defendant shall be entitled to an impartial jury, &c. Our statutes have generally made pecuniary interest, and that from consanguinity and marriage, a disqualification. *Dawson v. Wells*, 3 Ind. R. 398. They do so now, substantially, in cases of circuit judges and justices of the peace. At all events, they make it a valid ground of objection. 2 R. S. pp. 5, 74, 454.—Laws of 1855, p. 61.

It is contended that relationship by blood or marriage is not made, by statute, a ground of objection to a judge of

* Another case between the same parties, precisely like this, was this day decided in the same way, for the same reasons.

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the Court of Common Pleas. The act creating that Court contains these provisions:

"SEC. 9. If in any case cognizable in the Court of Common Pleas, the judge thereof may be or shall have been interested, either as counsel, executor, administrator, guardian, heir, devisee, legatee or otherwise, such case, and all matters relating thereto, shall be instituted, prosecuted and determined before the Circuit Court of the same county.

"SEC. 10. If during the pendency of any such suit or matter, the judge of Common Pleas shall become disqualified to hear and determine the same, for any of the causes specified in the last preceding section, such suit or matter shall be transferred to the Circuit Court of such county."

Why, in the cases provided for in both these sections, the cause was not directed to be certified to the Circuit Court; and why relationship was not mentioned as a cause of such transfer, it is, perhaps, not very easy to conceive. But such does not seem to be the case. The objection of relationship seems to be provided for in another part of the statute. On page 74, 2 R. S., it is enacted that a change of venue may be granted where "the judge is of kin to either party."

In view of this provision, we think we should not, as we should otherwise be inclined to do, extend, by construction, sections 9 and 10, above quoted, so as to make them include relationship by kindred or marriage.

The defendant, in this case, should have taken his objection by way of application to change the venue.

It is suggested that, as it was the defendant, himself, the party objecting, to whom the judge was related, the objection was not valid. We think this fact made no difference. The delicacy of the position would lead many a conscientious judge to lean against his relative, for fear of leaning in his favor—in striving to stand perfectly erect, to bend a little backward. Besides, the statute makes no distinction.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

J. Brownlee, for the appellant.

L. Van Devanter and *J. F. McDowell*, for the appellees.

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1858.JONES *v.* ROOCHE.STEBBENS
v.
CUBBERLY.APPEAL from the *Huntington* Court of Common Pleas.

Per Curiam.—The judgment in this case is affirmed with costs and 10 per cent. damages. The record presents no question to this Court. *Monday, May 31.*

J. D. Conner and *I. Delong*, for the appellant.*J. R. Coffroth*, for the appellee.STEBBENS *v.* CUBBERLY.APPEAL from the *Grant* Court of Common Pleas.*Monday, May 31.*

Per Curiam.—*Cubberly* filed, in the *Grant* Common Pleas, his complaint, in three paragraphs, on two promissory notes and an account. The notes, and a bill of particulars, were filed with the complaint. The notes and account were against one *Stebbens*. He affirmed by affidavit that the notes and account were due, that he confessed judgment on them not to defraud his creditors, &c.

The Court rendered the judgment.

Stebbens then appealed to this Court, and assigns for error, that the notes are not set out in the judgment. He refers to § 384, 2 R. S. p. 124.

We think that section applies only to cases where no complaint, containing a copy of the cause of action, or accompanied by the cause, is filed. In such case, the judgment, to bar another action for the same cause, should contain the statement provided for in that section. Here, the complaint supplies it.

The judgment is affirmed with 10 per cent. damages and costs.

J. M. Harlan, for the appellant.*A. Steele* and *H. D. Thompson*, for the appellee.

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1858.

CRAYCRAFT and Others v. PORTER.

WARBRITTON

v.
CAMERON.

Monday,
May 31.

APPEAL from the *Madison* Court of Common Pleas.
Per Curiam.—Suit upon a note. Judgment by default.
Appeal. We see no error in the case.

The judgment is affirmed with 5 per cent. damages and costs.

J. W. Gordon and *G. Tanner*, for the appellants.

BLISS and Others v. BERAN.

Monday,
May 31.

APPEAL from the *Cass* Court of Common Pleas.
Per Curiam.—The record in this case presents no question to this Court.

The judgment is affirmed with 1 per cent. damages and costs.

H. P. Biddle and *L. Chamberlin*, for the appellants.

D. D. Pratt and *S. C. Taber*, for the appellee.

WARBRITTON v. CAMERON.

A. and *B.*, as partners, were indebted to *C.* by note. *A.* sold his interest in the partnership to *D.* *D.* and *B.* agreed to pay all the debts of *A.* and *B.* Afterwards, *D.* sold his interest to *B.* Afterwards, *A.* gave his individual promissory note to *C.* for an unpaid balance of the partnership debt, *B.* agreeing to assign to him promissory notes for the amount. *C.* thereupon surrendered the partnership note. *A.* brought suit against *B.* on the promise. There was evidence tending to prove a demand by *A.* before suit. *Held*, that *A.* was entitled to recover.

Facts not denied by the answer, are to be taken as true on the trial.

A variance amendable in the Court below, will be deemed to be amended in the Supreme Court.

APPEAL from the *Warren* Court of Common Pleas.

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1858.

WORDEN, J.—This was an action on promises, brought by the appellee against the appellant.

WARBRITTON

v.

CAMERON.

Tuesday,
June 1.

The complaint alleges, in substance, that the plaintiff and defendant, as partners, were indebted to one *Samuel J. McAlilly* by note, for goods sold and delivered to them as such partners; that afterwards, the plaintiff sold his interest in the partnership to one *Charles Stedman*; that *Stedman* and *Warbritton* agreed to pay all the debts owed by the firm of *Cameron & Warbritton*; that afterwards, *Stedman* sold out all his interest in the partnership to said *Warbritton*, who agreed to pay all the debts both of *Cameron & Warbritton*, and *Warbritton & Stedman*; that afterwards, in *October*, 1855, the said *McAlilly* debt not having been paid by *Warbritton*, as he had agreed, an arrangement was made by which the debt was all paid, except 290 dollars, 18 cents, at which time said *McAlilly* agreed to take the individual note of *Cameron*, for said balance due, and surrender the partnership note, whereupon the said *Warbritton* agreed if *Cameron* would give his own note to *McAlilly* for said balance of said debt which he had agreed to pay, that he, *Warbritton*, to secure him for so doing would turn out and assign to *Cameron* notes to the amount of said balance of 290 dollars, 18 cents, whereupon *Cameron* gave his own note to *McAlilly* for said balance, which *McAlilly* received in full satisfaction of the partnership debt, and surrendered the partnership note. Breach, that the defendant refuses to turn out and assign the notes, according to his agreement, though often requested, &c.

The defendant, by his answer, admitted the partnership of plaintiff and defendant as charged, and admitted the contracting of the debt mentioned; but denies that it was to said *McAlilly*, but says it was to said *McAlilly* and one *George Johnson*. He also admitted that the plaintiff sold his interest to said *Stedman*, and that defendant bought out said *Stedman*, and that he agreed to pay the debts of said *Stedman* and himself; but denies that he agreed to pay the debts of the plaintiff.

The answer further sets up, that it was agreed between

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V.
CAMERON.

the plaintiff and defendant, that if the defendant would arrange and pay the balance of the debt due to *McAlilly & Johnson*, he, the plaintiff, would pay the 290 dollars to them; that the defendant did arrange and pay, according to his agreement; and he denies that he agreed to assign notes to the plaintiff to the amount of 290 dollars, or any other sum, but avers that the plaintiff agreed to pay said balance of 290 dollars without having any notes assigned to him, and that the defendant should be discharged from all obligation to pay any more on said debt.

The cause was tried by a jury. Verdict for plaintiff for 290 dollars, 18 cents. Motion for a new trial overruled, and judgment on the verdict.

The reason filed for a new trial is, that "the verdict is not sustained by the evidence, and is contrary to law." Exception was duly taken to the ruling of the Court, and the bill of exceptions sets out the evidence.

Whatever facts are not denied by the answer are to be taken as true on the trial.

In this case, the partnership of the parties and the indebtedness to *McAlilly & Johnson* is admitted, as is also the sale by the plaintiff to *Stedman*, and by *Stedman* to the defendant; neither does the answer deny the agreement by the defendant and *Stedman*, to pay the debts of *Cameron & Warbritton*; nor does it deny that *Cameron* gave his own note to *McAlilly* for the 290 dollars, 18 cents, the balance of the partnership debt, and that thereupon *McAlilly* surrendered the partnership note.

We have examined the testimony carefully, and think it makes out all the facts necessary to be proven under the pleadings. There was evidence showing that *Warbritton* agreed to let the plaintiff have the notes, as set up in the complaint, upon his giving his own individual note to *McAlilly*, and evidence tending to show that he had made a demand of them before the commencement of the suit. We do not decide that any demand was necessary, but if it was, it might fairly be inferred from the testimony. There was some conflict in the testimony, as to whether the defendant made the agreement to assign the notes to

the plaintiff; but the question having been passed upon by the jury, we are not disposed to disturb their finding.

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1858.

The testimony we think shows that the indebtedness, instead of being to *McAlilly* alone, was, as is alleged in the answer, to *McAlilly & Johnson*, and that the transaction throughout was with them; but probably *McAlilly* was the one who actively transacted the business. This however was a variance which could have been amended on the trial in the Court below. (2 R. S. p. 46, § 95), and, in such cases, the defect shall be deemed to be amended in the Supreme Court. *Id.* p. 162, § 580.

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v.
SPRAGUE.

Per Curiam.—The judgment is affirmed with costs (1).
J. R. M. Bryant and *R. A. Chandler*, for the appellant.
B. F. Gregory and *J. Harper*, for the appellee.

(1) See a case between the same parties, 9 Ind. R. 351.

WELLS and Others v. SPRAGUE.

On appeal to the Supreme Court in a chancery suit commenced and determined under the old practice, the Court presumes that all the evidence offered is before it, except the proof of such deeds, records, &c., as might be proven orally at the bar.

And the Court examines the cause upon the law and the facts, and decides it upon its merits.

Under the statutes of 1831, 1838 and 1843, a bill for the assignment of dower was bad if it did not allege a demand before the suit was brought.

And where no objection was taken to such a bill by demurrer but some of the defendants appeared and answered, while as to others the bill was taken as confessed,—*held*, that as to the parties answering, the cause should have been dismissed; and that a decree against the other defendants was erroneous.

ERROR to the *Laporte* Circuit Court.

Tuesday,
June 1.

WORDEN, J.—This was a bill in chancery filed by the appellee against the appellants, for the assignment of dower. The bill was filed in 1842, and in 1845 a final decree was rendered for the complainant. The bill was taken as

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confessed as to some of the defendants, and others answered.

The decree is, that the complainant is entitled to be endowed of the premises, and commissioners are appointed to set off her dower, and that the complainant recover costs, &c.

The bill does not aver that any demand was made for the assignment of dower before suit was brought, nor does it set up any excuse for not making demand; but no objection was taken to the bill on that ground by demurrer, but the parties who appeared, answered. The record does not show us that any proof of such demand, or excuse for not making it, was introduced on the hearing.

This being a chancery suit, commenced and determined under the old system of practice, we must presume all the evidence offered is before us, except the proof of such deeds, records, &c., as might be proven orally at the bar, on the hearing. *Gafney v. Reeves*, 6 Ind. R. 71.

The points relied upon to reverse the decree are principally these:

1. That the bill is radically defective, in not alleging a demand for the assignment of dower, before the suit was brought.

2. That there was not sufficient evidence.

3. That judgment for costs should not have been rendered against the defendants.

The proposition seems to be well settled, that on appeal to this Court in a chancery cause, the Court will examine it upon the law and the facts, and decide it upon its merits. *Gallion v. McCaslin*, 1 Blackf. 91, and note.—*Linn v. Barkey*, 7 Ind. R. 69.—*Morgan v. Snapp*, *id.* 537.

With this view, we will proceed to examine the questions presented.

Was it necessary to allege in the bill a demand for the assignment of dower?

By the statutes in force at the time the suit was commenced, and at the time it was heard, it was necessary to make a demand of the heirs or others having the next im-

mediate estate of freehold or inheritance, for the assignment of dower, before suit brought, and the bill or petition should aver such demand. *Spinning v. Rowland*, 7 Blackf. 7.

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SPRAGUE.

Such are the statutory provisions found in the several revisions of 1831, 1838, and 1843. In 1847, an act was passed dispensing with a demand of an infant, making the averment and proof of infancy an excuse for not making demand. Acts of 1847, p. 111. This latter act, of course, has no bearing on the case, but it shows the general spirit of legislation on the subject. By the statutes of 1838 and 1843, the party had a month to assign dower after demand made. R. S. 1838, p. 239.—R. S. 1843, p. 804.

The design of the legislature undoubtedly was, to give those entitled to the freehold an opportunity to do that amicably, which the law would require to be done if they refused. And until the demand is made, we see no ground for proceeding to compel the assignment of dower.

The bill, we think, is fatally defective, and the decree taken as confessed as against some of the parties, is erroneous. *McMullen et al. v. Furnass et al.*, 1 Ind. R. 160.

In relation to those who appeared and answered, the case presents more difficulty, but we think, as to them, it ought to have been dismissed on the hearing.

By the statute referred to, a demand for the assignment of dower, and a neglect or refusal to make a satisfactory assignment within the time prescribed, are necessary to entitle a party to go into Court to compel an assignment. There is no equity in a bill that does not allege that this necessary preliminary step has been taken, or show an excuse for not taking it.

In the case of *Muir v. Clark*, 7 Blackf. 423, it was held that a bill in chancery showing that the complainant has no equity, may be objected to at any stage of the proceedings. The case is placed beyond doubt when we consider that no demand, or excuse for not making it, was proven on the hearing. This essential element, necessary to the maintenance of the suit, was neither alleged nor proven, and we think it is fatal to the case. Whether such

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proof could have been admitted under the bill, or what would have been its effect, are questions not before us, and of course we do not decide them.

Per Curiam.—The decree is reversed with costs. Cause remanded with directions to dismiss the bill.

J. B. Niles and A. L. Osborn, for the appellants.

THE STATE on the relation of ROBINSON v. LEACH and Others.

A demurrer to a complaint pointing out substantially any one of the six defects specified by § 50 of the civil code (2 R. S. p. 38), is sufficient.

A demurrer under the fifth specification is good in the language of the statute, and where the demurrer is not taken in the language of the statute, but points out a fact, necessary to constitute a cause of action, not alleged in the complaint, it is good, so far as it goes, but it does not embrace any objection to the sufficiency of the cause of action, other than that specifically pointed out, although there be other defects that would have been reached by using the language of the statute.

In a suit by a mortgagor upon the official bond of a sheriff, for a penalty and damages under the statute of 1843, the first breach assigned in the complaint alleged that, on decree of foreclosure, the sheriff sold the property without giving the notice required by law. The defendants demurred, assigning for causes, 1. That there is no averment that the property sold was, at the time of the sale, the property of the relator. 2. That the statute gives no penalty.

Held, 1. That it is presumed that the mortgagor was the owner of the premises at the time the mortgage was executed; and if he afterwards sold his equity of redemption, that was matter to be alleged affirmatively by the defendants.

2. That § 427, R. S. 1843, p. 751, gives a penalty; and that section is not repealed by § 14, R. S. 1843, p. 1047, according to the provision in § 21, R. S. 1843, p. 1028; nor was it repealed by ch. 54 of the Acts of 1849; and as the suit was commenced prior to May 6, 1853, the penalty was saved by § 2 of the general repealing act of 1852, 1 R. S. p. 431.

The third breach alleged that the whole property was sold, when a part would have been sufficient to pay the debt, and that the property was susceptible of division. Demurrer, assigning for cause, that there was no averment that the relator requested a division. *Held*, that by § 413, R. S. 1843, p. 749, if the property was divisible, the sheriff could not sell more than was necessary to discharge the debt; and the sheriff is presumed to have known whether the property was susceptible of division.

The second breach alleged that the property was sold in fee simple, although the rents and profits for seven years had been appraised for more than was due on the execution, including all costs. Demurrer, assigning for cause that the sale was void. *Held*, that the sale might be void, and yet the relator could recover; that it was the duty of the sheriff, on failure to receive a sufficient bid for the rents and profits, to proceed as in case of other property, and the sale of the fee simple was a wrongful and unlawful act; and where a sheriff in the discharge of an official duty is guilty of a wrongful and illegal act which results in damage, he and his sureties are responsible.

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APPEAL from the *Union* Circuit Court.

Tuesday,
June 1.

WORDEN, J.—Debt on a sheriff's bond.

The declaration sets out an ordinary sheriff's bond, dated *September 2, 1851*, conditioned as required by law, and assigns three breaches.

The first breach assigned is, that the said *Joshua Leach* (the sheriff) did not duly, honestly and faithfully discharge and perform all and singular his duties as such sheriff, during his continuance in office as such sheriff, in all things agreeably to law, in this, that on the 26th of *March, 1851*, *Jonathan Starr* recovered a decree against the relator, in the *Union* Circuit Court, on a bill to foreclose a mortgage for the sum of 748 dollars, 25 cents, and in default of payment within six months, that the land mortgaged be sold, and the equity of redemption barred and foreclosed; and that on the 26th day of *September, 1851*, a copy of said decree, with an execution thereon, was issued and placed in the hands of said sheriff, who levied the same upon the mortgaged premises, and on the 4th of *January, 1852*, sold the fee simple of the same, being still the property of the relator, to one *James M. Conwell*, for the sum of 2,900 dollars, and on the 2d of *February* of the same year, executed and delivered to *Conwell* a conveyance thereof; that said sale was made without publicly advertising the time and place of sale for at least twenty days successively immediately previous to the day of sale, by posting up written or printed notices thereof in three of the most public places in the township in which the property was situated, and a like advertisement at the door of the court-house of the county; that said property was then, and is, worth the sum

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of 3,600 dollars. Wherefore the relator claims 700 dollars as damages, and 200 dollars as a forfeiture or penalty.

For a second breach, it is alleged that said execution came to the hands of said sheriff, and was by him levied on said lands, they still being the property of the relator, and that on the 21st of *October*, 1851, he had the same appraised by competent appraisers at the sum of 2,900 dollars, and the rents and profits of the same for seven years at the sum of 79 dollars per year, and that on the 12th of *December*, 1851, the relator paid said sheriff on said execution 429 dollars, and that the whole amount due on said execution on said day of sale, including principal, interest and costs, and the costs of the sale, amounted to only the sum of 391 dollars, 3 cents, being 161 dollars, 97 cents less than the appraised value of the rents and profits of said land for seven years; that on the day of sale, the sheriff offered the rents and profits for seven years, and receiving no bid therefor, instead of returning the same unsold for want of bidders, wrongfully and unlawfully offered and sold the fee simple of the said real estate, and executed a conveyance therefor to said *Conwell*, as above stated, for said sum of 2,900 dollars, the same then being worth 3,600 dollars—by means whereof the relator is entitled to have and recover from defendant the sum of 200 dollars as forfeiture or penalty, and the further sum of 700 dollars for his damages sustained by reason of the premises.

For a third breach, it is alleged that said execution came to the hands of said sheriff, and was by him levied on said lands, as aforesaid, and that on the 21st of *October*, 1851, the same was duly appraised at the sum of 2,900 dollars, and that on the 12th of *December*, 1851, the relator paid said sheriff on said execution the sum of 429 dollars, and that the whole amount due on said execution on the day of sale, including principal, interest and all costs, and the costs of said sale, amounted to only the sum of 391 dollars, 3 cents, and that the sheriff wrongfully and unlawfully offered and sold the fee simple of the whole of said land, and executed a conveyance therefor to said *Conwell*,

as above stated, for the sum aforesaid, that said land was then and now is worth 3,600 dollars, and that the same is susceptible of division, and that a portion of the same, to-wit, twenty-five acres, was amply sufficient to satisfy said execution, and is, and was then worth the whole amount due on said execution, and might have been divided from the remainder, and sold separately, to satisfy the same. Wherefore the relator claims 200 dollars as a forfeiture or penalty, and the further sum of 700 dollars for his damages sustained.

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To this declaration, the defendants demurred, assigning the following causes:

1. "There is no averment that the property sold was, at the time of the sale, the property of the plaintiff.

2. "Because the statute gives no penalty for a violation of duty in making sale under the execution law of 1843, the same being amendatory of the law of 1842, and under which said sale was made.

3. "Because, as to so much of said several breaches as unites the penalty and damages, said defendants say they cannot be united.

4. "For further cause to the third breach, because there is no averment that the said relator requested a division, or selected a part to be levied on and sold in satisfaction of said execution.

5. "Because the sale was void, as shown in the second breach."

The Court sustained the demurrer to the second and third breaches assigned, and also as to so much of the first as claimed the penalty.

To this decision of the Court, the plaintiff duly excepted, and thereupon the defendants filed their answer to that part of the first breach to which the demurrer was not sustained, and the plaintiff was ruled to reply on or before the second day of the next term, and the cause was continued. On the second day of the next term thereafter, the plaintiff was called, and refusing to reply, the cause was dismissed for want of prosecution, at the costs of the plaintiff.

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LEACH.

The errors assigned are, the sustaining of said demurrer, and the dismissing of the cause, and rendering judgment for costs against the plaintiff.

The questions arising on this demurrer require a reference to the statute pointing out the causes for which a party may demur. By 2 R. S. p. 38, § 50, it is provided that "the defendant may demur to the complaint when it appears upon the face thereof, either—

"First—That the Court has no jurisdiction of the person of the defendant, or the subject-matter of the action; or,

"Second—That the plaintiff has not legal capacity to sue; or,

"Third—That there is another action pending between the same parties for the same cause; or,

"Fourth—That there is a defect of parties, either plaintiff or defendant; or,

"Fifth—That the complaint does not state facts sufficient to constitute a cause of action; or,

"Sixth—That several causes of action have been improperly united.

"And for no other cause shall a demurrer be sustained," &c.

If we were to hold that a party can demur for causes to be assigned in the precise language of the statute only, then this judgment is erroneous in sustaining the demurrer, and must be reversed, as neither of the causes is assigned in the language of the statute.

But this, we think, would be too narrow a construction, especially when we consider that the legislature have provided as a rule of construction, "that the provisions of this act shall be liberally construed, and shall not be limited by any rules of strict construction." P. 223, § 800. The statute provides that a party may demur whenever any of the six specified objections appear on the face of the complaint, and we think a demurrer pointing out substantially any one of the six defects mentioned, a substantial compliance with the statute.

To illustrate: Suppose to a complaint on contract (in

a case where no consideration is presumed), the defendant should demur, and point out as cause that no consideration was alleged, or that there was no breach alleged, this, we think, would be well taken, under the fifth specification, as it would point out a fact necessary to be stated in order to constitute a good cause of action. A demurrer under the fifth specification would be well taken in the language of the statute, "That the complaint does not state facts sufficient to constitute a cause of action;" and where that statement is omitted, and the demurrer proceeds to point out a fact necessary to constitute a cause of action, which is not alleged in the complaint, it seems to be substantially the same thing so far as it goes, only it is more specific as to the objection, and would not cover any objection other than that specifically pointed out, although there be other necessary facts not stated, that would have been reached, had the language of the statute been employed.

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This view of the law in nowise conflicts with the case of *Lane v. The State*, 7 Ind. R. 426, as the demurrer in that case simply alleged that "they [the paragraphs demurred to] are insufficient in law to constitute a legal defense to the action." The Court, in that case, very properly say that the demurrer did not conform to the provisions of the statute, because it included neither in terms, nor in substance, any of the statutory causes of demurrer.

With this view, we will proceed to the examination of the questions raised by the demurrer. The cause of demurrer first assigned is, that there is no averment that the property sold was, at the time of the sale, the property of the plaintiff. The wrong complained of was in a proceeding to collect the money on a decree foreclosing a mortgage given by the relator, and we think we are authorized to presume that he was the owner of the property at the time of the execution of the mortgage, and if he has since sold his equity of redemption, we think it is a matter to be alleged affirmatively by the defendants.

The second cause of demurrer raises the question whether, under the statute of 1843, the plaintiff is entitled to the penalty claimed. It may be that this assignment comes

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within neither of the six specifications of the statute, but as we have concluded that it ought to have been overruled on other grounds, we have not considered whether it is in compliance with the statute.

The first breach assigned in the complaint alleges a sale of the property, without giving the notice required by law. Section 414, R. S. 1843, p. 749, provides for notice of sale of real estate, and § 427, p. 751, provides that, "Any officer who shall sell any real estate without giving the previous notice herein prescribed shall forfeit and pay to the party injured 200 dollars, in addition to such other damages as such party may have sustained, to be recovered from such officer, or from him and his sureties, in a suit on his official bond."

We will here remark that no statute has been cited, and we know of none, which gives a penalty upon the facts set up in the second and third breaches assigned. The section above quoted is applicable to the first breach only.

It is claimed that the section above quoted was repealed by an act passed at the same session of the legislature, and approved *February* 11th, 1843. R. S. 1843, p. 1044. It will be observed that the last-named act was approved on the day of the approval of the revision of 1843. The act, a section of which is quoted above, is contained in the revision of 1843, but the other act is not, although it is bound in the same volume. In said revision, p. 1028, § 21, is found the following provision, viz.:

"Whenever any act passed at the present session of the general assembly, separate from the Revised Statutes, shall conflict with or contravene any of the provisions contained in the Revised Statutes, any such provision or provisions of the Revised Statutes shall be abrogated and of no force or effect as to the subject-matter coming within the purview of such act or acts."

The other act, not contained in the revision, contains the following provision, viz.:

"All laws coming within the purview of this act be and the same are hereby repealed; and nothing in the revision of the laws at the present session shall be taken and con-

strued to contravene or repeal any of the provisions of this act." R. S. 1843, p. 1047, § 14.

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We think these two statutes, being *in pari materia*, are to be construed together, so as to give effect to each so far as they are not inconsistent with each other; and so far as they are inconsistent, the provisions of that embraced in the revision must give way to the other. We see nothing in the act, nor in the revision, that in any manner conflicts with or contravenes § 427 in the revision, above quoted. On the contrary this section and the said act, so far as we can perceive, may both stand and have full effect in all respects. The said act not in the revision, does not make any provision on the subject of notice of the sale of real estate, nor provide any penalty, nor repeal any penalty provided, for selling without notice; and as they are not in conflict with each other, and as both may stand together and have full effect, we think said section is not "abrogated" by § 21, above quoted, in the revision.

Is said § 427 repealed by the repealing clause above quoted in the act not in the revision? We think not, as the subject-matter of it does not come within the purview of that act. As before remarked, that act does not make any provision for notice of sale, and is silent on the subject of selling without notice.

It contains enactments as to the manner of selling property on execution, &c., but does not profess to provide fully on the subject "of executions, and the duties and liabilities of officers thereon," as does the act in the revision. The reasoning which would lead to the conclusion that this section was repealed, would lead to the same conclusion in reference to the entire law in the revision on the subject of executions, which we think was evidently not the intention of the legislature. This point has already been before this Court in the case of *The State v. Youmans*, 5 Ind. R. 280, although it was alluded to only incidentally. That was a suit to recover for a failure to return an execution, and based upon § 462 of the act in the revision of 1843. The Court say in the case:

"An act in force when this suit was instituted, and upon

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which it was founded, provides that if any officer," &c., reciting said § 462.

The Court held that said section was repealed by an act of 1849. Acts of 1849, p. 64. The act of 1849, however, does not repeal § 427. It is claimed, however, that it was repealed by the code of 1852, and that, being a penal provision, the penalty cannot be enforced after the repeal. Undoubtedly when a penal statute is repealed without any saving, the penalty falls with the statute, as there is no vested right in a penalty; and this is the case, although suit may be pending for the penalty. *The State v. Youmans, supra.*

The repealing act of 1852 contains the following provision, viz:

"No rights vested, or suits instituted, under existing laws, shall be affected by the repeal thereof, but all such rights may be asserted, and such suits prosecuted, as if such laws had not been repealed." 1 R. S. p. 431, § 2.

If this suit was instituted and pending at the time the revised code of 1852 took effect (*May* 6, 1853), we think the penalty was saved under the above provision. The record of the case shows no process, but it shows that on the 6th judicial day of the spring term of the Court, commencing on the 28th day of *February*, 1853, the parties appeared, and the plaintiff refiled her declaration. We think the suit must be deemed to have been instituted on the appearance of the parties, at the spring term, 1853. *The State ex rel. &c. v. Clark et al.*, 7 Ind. R. 468. It follows that the proceedings were not affected by the repeal. The demurrer should have been overruled as to the first breach.

We shall pass over the third cause of demurrer assigned, as no point is made in reference to it by counsel on either side, in their briefs. *Baily et al. v. Snyder*, 8 Ind. R. 109.

The fourth cause of demurrer to the third breach, points out the fact that there is no averment therein that the relator requested a division of the property, &c.

The breach alleges a sale of the whole property, when a

a part would have been sufficient to pay the debt; that the property was susceptible of division; and that a small portion could have been sold for sufficient, &c.

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The statute in force at the time of the sale, provides that "no more of any real estate shall be offered for sale than shall appear necessary to satisfy the execution, unless the same is not susceptible of division." R. S. 1843, p. 749, § 413.

In the case of *Reed v. Diven*, 7 Ind. R. 189, the Court held that a similar provision in the statutes of 1852 "imposes a duty on the sheriff which he may not omit. The property levied on, being divisible, he is restricted from offering more of it than may be necessary to discharge the debt in his hands for collection." It was claimed in the case cited, that in order to bring the sheriff in default, the execution-defendant should have furnished him with a map or other description, showing that the land lay in separate tracts. But the Court held that, under the statute, "the sheriff himself, when he levies upon real estate must be presumed to know whether it is susceptible of division."

The above cited case seems to settle the question raised by this assigned cause of demurrer.

The demurrer to the third breach should have been overruled.

The fifth and last cause of demurrer, applies to the second breach, and alleges that the sale therein set up was void. This breach alleges a sale of the property in fee simple, although the rents and profits for seven years had been appraised for more than was due on the execution, and all costs. The duty of the sheriff, in such case, was pointed out by the statute, as follows, viz.:

"Whenever such rents and profits are appraised at a sum equal to or exceeding the amount due on such writ, such real estate shall not be offered for sale, but the rents and profits shall be offered, and if they will not sell for their appraised value, the officer shall proceed in the same manner as in case of other property." R. S. 1843, p. 1047, § 10. He might have reoffered them not exceeding three times in the lifetime of the writ, and if on the return-day of

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the writ they remained unsold for want of buyers, he should have returned the writ, with his doings thereon. *Id.* p. 1045, §§ 4, 5 of the same act.

We think that although the sale may be void, (a point which we do not decide, and upon which we intimate no opinion,) that is no reason why the relator should not recover. If the sale was valid, he was damaged to the extent of at least the difference between the value of the land, and the price at which it was sold; and if the sale was void, we think he might be damaged by having a cloud thrown over his title, and he might be subjected to harassing, vexatious and expensive litigation to remove it. In the case of *The State v. Lines*, 4 Ind. R. 351, it is said by the judge who delivered the opinion, that—"When a sheriff accepts the office, he contracts that he will faithfully discharge its duties. This plainly embraces every duty required by law. It follows, that when he omits any act of duty enjoined by virtue of his office, he is guilty of a breach of his contract, and will be held responsible, should damages result from such breach." (1)

We think, also, that where, in the discharge of a duty required of him by law, and by virtue of his office, he is guilty of a wrongful and illegal act which results in damage, he is equally responsible, as well as his sureties on his bond.

It was the duty of the sheriff, on failure to receive a sufficient bid for the rents and profits, to proceed "as in case of other property," and the sale of the fee simple was a wrongful and unlawful act.

It is alleged in argument, that no damages are shown to have been sustained, and therefore, the demurrer as to this breach was correctly decided. The answer to this proposition is, that no such cause of demurrer is assigned. Had the language of the statute been employed, that the breach "does not state facts sufficient to constitute a cause of action," perhaps this position would have been correct. As the objection (if it be a valid one) was not pointed out by the demurrer, and as the demurrer undertakes to point out specific defects, and is not placed upon the broad ground

that the pleading "does not state facts sufficient to constitute a cause of action"—thereby leaving the party at liberty to rely on the omission of any fact necessary to be stated—it ought not to be considered in determining the demurrer.

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We are of opinion that the demurrer should have been overruled as to the second breach.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Yaryan, for the state.

C. H. Test, J. S. Reid and J. F. Gardner, for the appellees.

(1) See, also, 9 Johns. 381; 6 Blackf. 444; *Ford v. Godbald*, 2 Strobb. 109.

BATES and Another v. DEHAVEN and Another.

Complaint in two paragraphs, 1. Upon a special contract; and 2. For work and labor and materials furnished. Motion to strike out the second paragraph, and also to compel the plaintiff to elect upon which he would rely, overruled. There was nothing in the record showing the two paragraphs to be for one and the same cause of action. *Held*, that there was no error.

Parol evidence of the circumstances surrounding a contract in writing, as well as of the mutual acts of the parties in its fulfillment, is admissible to explain the meaning of the parties in the use of language otherwise obscure.

And where the contract was abandoned by mutual consent, and each party did a portion of the work concerning which the contract was made, without regard to its provisions, parol evidence is admissible to show the value of the work done by the parties respectively.

APPEAL from the *Fayette* Court of Common Pleas.

Tuesday,
June 1.

HANNA, J.—The appellees sued the appellants. The complaint contained two paragraphs—1. On a special contract; 2. For work and labor and materials furnished.

The defendants, in the Court below, filed what they called a written motion to strike out the second paragraph of the complaint, and also to compel the plaintiffs to elect

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upon which paragraph they would rely. This motion was overruled; which ruling is now assigned as the first error.

The ruling of the Court was correct. There is nothing in the record to show that the two paragraphs are for one and the same cause of action. Nor would we be understood as intimating that there might not be cases in which similar paragraphs to these might be based upon one cause of action. That question is not before us.

The defendants answered in two paragraphs—1. A general denial; 2. By way of set-off, that plaintiffs were indebted to defendants for work, &c., in quarrying and loading stone; to which was filed a general denial.

Trial by the Court, finding for the plaintiffs, and judgment on the finding, over a motion for a new trial.

The second error assigned is, that improper evidence was admitted.

The special contract given in evidence, was an article of agreement by which the plaintiffs agreed to “furnish stone for the railroad bridge across *Little Williams Creek*, at the following prices: Per perch at *Vance’s* quarry, 60 cents; per perch from *George Booe’s* quarry, 70 cents.” The agreement was dated *June* 14th 1854, and further provided that the stone was to have been delivered “by the first day of *December* next, to be paid for every estimate, with a deduction of ten per cent. until the whole contract is completed, at which [time] this ten per cent. kept back to be paid on the completion of the contract [is to be paid]. The bridge at *George Davis’s* is included in this contract.”

Upon this, the first paragraph of the complaint is founded. The second, is for stone sold and delivered, and for work and labor, &c.

The evidence admitted over the objection of the defendants was, first, that of *George Booe* and *George Davis* as to the value or price of hauling stone from the quarry to the bridge. *Booe* stated that stone was worth at *Vance’s* quarry 60 cents to 70 cents per perch, and the hauling worth about 60 cents. *Davis* stated that the hauling of stone from *Vance’s* quarry to the bridge at his house, was worth 90 cents per perch.

It is insisted upon the one part, that the written agreement imposed upon the plaintiffs the duty of taking all necessary steps to insure the furnishing the stone; such as quarrying, hauling, and delivering the same at the places where the bridges were to be built. The other party construes the contract to mean only that they should haul the rock, and not that they should quarry the same; and insist that the testimony as to the value of hauling was therefore properly received for the purpose of explaining what was intended to be meant by the word "furnished," as used in the contract. The same arguments are used in reference to the evidence of *Beaird*, which was admitted over the objection of defendant, in regard to the question of loading the stone, and is as follows: "I drew the article, and after it was read, and before it was signed, it was objected to by plaintiffs, that nothing was said about loading, and defendants said that it did not matter, as they were to furnish hands to help to load."

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The defendants had proved that they had quarried and loaded the stone, which was worth 75 cents a perch.

A late writer upon evidence, uses the following language in treating this question: "The writing, it is true, may be read by the light of surrounding circumstances, in order the more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, nor substituted in its stead. The duty of the Court in such cases, is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used." 1 Greenl. Ev. § 277. See, also, §§ 280, 282, 288, 295. The last section cited shows that the principle upon which the parol evidence is received is, "that the Court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted." See, also, 2 Pars. Cont. 74; 5 Blackf. 89; 4 Ind. R. 417; *Id.* 521; 9 *id.* 27. The language of the agreement in the case at bar is, that the plain-

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tiffs are to furnish stone *at Vance's* quarry and *from George Booe's* quarry at certain prices. The evidence shows, so far as it discloses anything upon the point, that the defendants caused the stone to be quarried and loaded; that it was procured at *Vance's* quarry; that the plaintiffs hauled it to the place where it was to be used; and the value of such hauling. It will be seen that a literal construction of the language used in the instrument, would bind the plaintiffs, as to the stone to be procured at *Vance's*, to furnish the same *at* the quarry, and not at the places where the bridges were to be built. From the evidence, it is manifest that the parties either totally disregarded the written contract as thus construed, or intended and understood it to mean something different from what this literal construction would imply. If the written agreement was abandoned by mutual consent, and each party proceeded to do a portion of the work, even if it was that part which would by the terms of the agreement have devolved upon the other party, the evidence was properly admitted to show the value of the work done by the plaintiffs. So evidence of the mutual acts of the parties, in reference to the fulfillment of the contract after it was entered into, was properly admitted to show what their intention and understanding was in the use of language otherwise somewhat obscure.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

J. A. Fay and *N. Trusler*, for the appellants.

B. F. Claypool, for the appellees.

CRABB, Administrator, v. ATWOOD & Co.

In a suit against an administrator upon a promissory note given by his decedent, the Court has not jurisdiction of the person of the defendant, unless he has had actual or constructive notice of the pendency of the proceedings against him.

If the clerk fail to present such claim to the administrator, according to § 65, 2 R. S. p. 261, and it be not spread upon the appearance-docket, according to § 66 *id.*, there is no notice.

The note filed in this case did not contain the names of *Atwood & Co.*, the payees; but, *held*, that it is a sufficient statement of the claim under the statute.

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APPEAL from *Bartholomew* Court of Common Pleas. Tuesday,
June 1.

HANNA, J.—In *July*, 1851, the appellees filed in the office of the clerk of the Court of Common Pleas, a note, of which the following is a copy:

“ \$653.68 Philadelphia, June 20, 1850.

“ Six months after date the subscriber, of *Columbus*, of the county of *Bartholomew*, state of *Indiana*, promises to pay to the order of *Atwood & Co.* six hundred and fifty-three dollars, 68 cents, value received, without defalcation, and without relief from any valuation or appraisement laws. [Signed,] S. Crabb.

“ Cr. on book, June 24, by cash, - - - - \$100

“ “ by 5 per cent. - - - - 5

105.”

At the *April* term (1853) of that Court, an entry was made on the appearance-docket of the Court in the following form:

“ *Crabb, Strawder*, dec'd. *John Crabb*, adm'r. Note, \$653.68.”

The entry was not afterwards made or continued upon any of the dockets of said Court until the *January* term, 1854, when the following entry again appeared upon the docket, but which particular docket is not stated, to-wit:

“ *Atwood & Co. v. John Crabb*, administrator of *Strawder Crabb*, dec'd.”

Then follows an entry to the effect that the said *John* failing to appear and make defense, *Herod* and *Stansifer*, his attorneys, are called by courtesy, &c., and failing to appear, judgment [was rendered] for plaintiff.

Had the Court jurisdiction of the person of the defendant?

To give the Court jurisdiction, the administrator must

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Co.

have had actual or constructive notice of the pendency of the proceeding against him. 2 Ind. R. 174.

The record does not show actual, nor constructive notice, unless the facts above set forth amount to such notice, under our statutes. The provisions of the statute bearing upon this question are contained in §§ 62, 65, 66, 2 R. S. p. 260. In 1853, an attempt was made to amend these sections, but such amendment is unconstitutional. 6 Ind. R. 32.—5 *id.* 327.

By § 62, a succinct statement of the nature and amount of every claim of the character of this must be filed, &c. By § 65 it is made the duty of the clerk to make out a list of all claims filed against any estate, and at the next term of such Court thereafter, present the same to the executor, &c., when further proceedings shall be continued to the ensuing term of the Court, &c. By § 66 it is provided that such list shall be spread upon the appearance-docket of the Court, and shall stand for trial at the second term after they are filed, whether such executor, &c., appear or not.

This is a mode of proceeding peculiar to our statute, and not known to our former practice, which required regular action, service of process, &c. 6 Blackf. 74.

The statute should be pursued with a reasonable degree of certainty.

In the case at bar, there is nothing appearing of record showing that the clerk performed his duty under § 65; the claim was not, under § 66, spread upon the appearance-docket at the term preceding; and indeed the manner in which it appeared upon the docket, at several terms before, was not a sufficient notice. The form of docketing did not apprise the administrator in whose favor the claim was preferred.

The second point made is, that the note filed is not a "succinct statement," such as is required by § 62, because it does not contain the names of the payees.

We think for the purposes intended by this statute the note was a sufficient statement.

Per Curiam.—The judgment is reversed, with costs. May Term,
Cause remanded, &c. 1858.

W. Herod and S. Stansifer, for the appellant.

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10	325
126	244
10	325
144	683

PRIBBLE v. KENT and Another.

Suit to recover the value of a quantity of corn stored with warehousemen.

The receipt given for the corn was as follows: "*Portland, February 16, 1856. Received in store from Barnard Pribble by same for same, not transferable without notice, and not accountable for loss by fire, 132 bushels 43 lbs. corn, in store till 1st May, at 2 cents. Kent & Hitchens.*" Held, that the receipt shows a contract by which the specific article deposited was to be redelivered.

In this species of bailment, the property remains in the bailor, and the bailee holds a lien upon it for the storage.

On the first of *May*, in this case, the bailor had a right to demand and recover the corn, on paying the charges for storage.

The bailor failing to make such demand, the bailee may, at the end of one year, under our statute, sell the deposit, after notice, at public auction.

But here, the bailor's complaint shows that he demanded the corn and tendered the amount due for storage, on the 18th of *September* following—the bailees not having yet disposed of it by any legal mode. Held, that the bailees should have redelivered the deposit, and having failed to do so, an action against them for its value was well brought.

The suit was in the nature of an action of trover; the demand and refusal would be evidence of conversion; and the value of the property at that time would, it seems, be the measure of damages.

As a general rule, a receipt is not a contract, and parol evidence may be admitted touching its subject-matter, while a written contract, as a general rule, precludes such evidence; but a receipt may be so drawn as to constitute a contract, and a contract may be interpreted or construed by viewing it in the light of established custom.

APPEAL from the *Warren* Court of Common Pleas. Tuesday,
June 1.

PERKINS, J.—Suit to recover the value of a quantity of corn.

The first paragraph of the complaint reads thus:

"*Barnard Pribble* complains of *William Kent* and *Elisha Hitchens*, and says that the said defendants, on the 16th day of *February*, A. D. 1856, by their certain receipt in

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writing, a copy of which is filed herewith, acknowledged, under the name of *Kent & Hitchens*, that they had received from the plaintiff, in store until the first day of *May*, at 2 cents storage, 132 bushels and 43 pounds of corn, not transferable without notice, and not accountable for loss by fire. And the plaintiff avers that said corn was not destroyed by fire and was not transferred. And the plaintiff further avers that said defendants were warehousemen, purchasing corn and other produce; and that it was and is according to the custom of warehousemen to receive corn in store and pay the market price therefor at any time when the holder of receipts for it may be willing to sell, or deliver it on demand, or pay the then price of corn. And the plaintiff avers, that on the 18th day of *September*, 1856, he offered to sell said corn to the defendants at the then market price, which was 40 cents a bushel, but they refused to purchase it; that thereupon he then and there, at the warehouse of said defendants, on said 18th of *September*, tendered to them the amount of storage then due, to-wit, 9 dollars and 25 cents, (and brings the same into Court, &c.,) and demanded the corn of said defendants, and that they then and there refused, and still refuse, to deliver the same to the plaintiff," &c.

Copy of receipt.

"*Portland, February 16, 1856.* Received in store from *Barnard Pribble* by same for same, not transferable without notice, and not accountable for loss by fire, 132 bush., 43 lbs. corn, in store till 1st *May*, at 2 cents.

"*Kent & Hitchens.*"

There were two other similar paragraphs in the complaint, upon two other receipts for grain.

Demurrers were sustained to all of these paragraphs, because they did not state facts constituting a cause of action.

Counsel for the appellee vindicate the ruling of the Court upon the demurrers by reasoning thus:

They say the appellant might have demanded the corn on the 1st of *May*, or in a reasonable time thereafter, but could not subsequently. That on his failure to so demand it,

the appellees had the right to appropriate the corn to their own use, and pay the appellant therefor, when he might demand it, the current price of the corn at the time they so appropriated it.

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We must first inquire into and ascertain the character of the contract between the parties. It was clearly one of bailment, not of sale. *Ashby v. West*, 3 Ind. R. 170.—*Ewing v. French*, 1 Blackf. 353. This is admitted. But there are different kinds of bailment. There is one in which the specific article deposited is to be returned; and another in which its value is to be returned in an article manufactured from that deposited. *Mallory v. Willis*, 4 Comst. 76.

We think the bailment in this case was of the kind first mentioned—that by the contract, the identical corn deposited was to be returned. This we take to be the fair import of the receipt. *Wadsworth v. Allcott*, 2 Seld. 64. See, also, 4 Hill, 104 to 107. The property in the corn, then, remained, in this case beyond doubt, in the bailor, *Pribble*, and was in him on the first day of *May*, 1856. The parties, on that day, then, stood in this relation to each other. *Kent* and *Hitchens* held the corn as bailees of *Pribble*, with a lien upon it against him as the owner, for the amount due for storage. *Pribble* had a right, at that time, to demand and recover the corn on paying charges for storage. He failed to do either. What, then, became the right of *Kent* and *Hitchens*? Not, certainly, without notice to *Pribble*, to throw the corn into the street, or convert it to their own use. *Kitchell v. Vanadar*, 1 Blackf. 356.—*Coffin v. Anderson*, 4 id. 395.—*Ingersoll et al. v. Emmerson*, 1 Ind. R. 76.—*Wolf v. Esteb*, 7 id. 448. Probably, at common law, they might have sold, after reasonable notice to *Pribble*, without judicial process, or with such process, to satisfy their lien for storage. *Evans v. Darlington*, 5 Blackf. 321. Our statute provides that, in such cases, a sale may take place after notice, at public auction, at the end of one year from the date of storage. 2 R. S. pp. 240, 241, §§ 4, 8. Here, the bailees, not having disposed of the deposit by any legal mode, it was their duty to have redelivered it, in compliance with the demand made by the bailor, accom-

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panied, as it was, by a tender of the full amount due for storage. Having failed to do so, this action well lies against them.

The Court erred in overruling the demurrer.

Counsel have discussed the question of damages, should the plaintiff recover. The suit is in the nature of an action of trover. The demand and refusal would be evidence of conversion, and the value of the property at that time, would seem to be the natural measure of damages. *Stevens v. Low*, 2 Hill, 132. Perhaps circumstances might justify the infliction of more.

So far, we have looked at the case without reference to any custom or usage, in this department of business, which might bear upon it.

We are not prepared to say that the rights of the parties might not be affected by a custom so long continued, known, and universal, as to be legal. The general principle is that a receipt, not being a contract, does not preclude parol evidence touching the subject-matter of it; while, on the other hand, a written contract, as a general rule, does preclude such evidence. But a receipt may be so drawn as to constitute a contract; and a contract may be interpreted and construed—a meaning assigned to leading and controlling words in it—by viewing it in the light of established custom. See a valuable review of the cases on this point in Rawle's ed. of Smith on Cont., top p. 95; also, Edwards on Bailment, tit., Warehousemen; *Dawson v. Kittle*, 1 Hill, 407; 1 Ohio St. R. 248; *Mason v. Beard*, 2 Ind. R. 505; *Rapp v. Grayson*, 2 Blackf. 130, *Cox v. O'Riley*, 4 Ind. R. 368; *Harper v. Pound*, 10 Ind. R. 32; and the cases cited above from *Hill*, *Comstock* and *Selden*.

Without the evidence, it will be impossible to make any application of the rule to this case.

Per Curiam.—The judgment is reversed with costs. Cause remanded for trial.

R. A. Chandler, for the appellant.

B. F. Gregory and *J. Harper*, for the appellees.

MILES v. ELKIN and Another.

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This Court will not hold that damages for refusing to comply with an arbitration-bond, touching differences growing out of a contract, can be made matter of recoupment, where the complaint does not indicate that the cause of action had any connection with such contract, and the evidence is not upon the record,—if, indeed, it would in any case; and certainly such damages could not be made matter of set-off.

Nothing can be recovered for use and occupation or for rent, where the premises were occupied under a contract of purchase, and that contract had been rescinded, and the property received back by the vendor.

This Court cannot say that the rejection of evidence was error, where there is nothing in the record showing its relevancy to the case made.

APPEAL from the *Clay* Circuit Court.Tuesday,
June 1.

PERKINS, J.—This was a complaint, substantially like the common counts, for goods, &c., sold, money paid, had and received, &c., in a declaration under the common-law practice. It was accompanied by a bill of particulars.

The defendant answered by general denial, and in a paragraph by way of counter-claim, asserting that on the 15th of *October*, 1855, the plaintiffs, *Elkin* and *Houston*, made a written contract with the defendant, *Miles*, for the purchase from him of certain real estate, called the *Clay Mills*, together with the books of account, stock of materials on hand, &c., and, in payment for the same, to pay a schedule of debts due from the defendant to certain persons, before the first day of *April*, 1856, and also to deliver, to the defendant, at *Newberg*, by the first of *November*, 1855, 200 barrels of flour, valued at 1,250 dollars. He avers that they took possession under the contract, collected the debts due upon the books, converted to their own use the stock on hand, but failed to pay or assume the debts owed, as by agreement they were to do, and to deliver to the defendant the 200 barrels of flour; that he was compelled to take back the mills, and sustained 5,000 dollars of loss.

He also claims a set-off for rents, goods sold, &c.

In another paragraph he alleges that the parties mutually agreed to arbitrate the matter, and entered into bonds, but that the plaintiffs failed and refused to comply with

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the agreement to arbitrate, for which he claims damages on account of his trouble of preparation therefor, &c.

He also filed certain interrogatories to be answered by the plaintiffs. The various written instruments referred to were filed.

The plaintiffs replied by general denial, and in further paragraphs setting up that the defendant, *Miles*, represented the debts to be paid by the plaintiffs, at a much less sum than they actually amounted to, and that he had actually combined with certain of the creditors to get the debts nominally increased, for a fraudulent purpose, beyond their real amount; that he had no title to the mill property; that they had applied collections on the accounts, and proceeds of sale of personal property, to the payment of defendant's debts, &c.; that the rents claimed by defendant were for the use of the property while they held it as purchasers. They answered the defendant's interrogatories, and propounded certain others to be answered by him, which he answered.

The cause was tried by a jury, who returned a verdict for the plaintiffs of a fraction over 900 dollars, and the Court, over a motion for a new trial, rendered judgment on the verdict.

The evidence is not upon the record.

It appears by bills of exception—

1. That the Court sustained a demurrer to the paragraph of the answer claiming damages for the refusal to arbitrate pursuant to bonds given.

2. That the Court refused to strike from the bill of particulars the claim for rent while the mills were occupied under the contract of purchase, but nevertheless refused to permit proof of the value of the use and occupation of said mills.

3. That the Court refused to permit a certain quitclaim deed, named and copied in the bill of exceptions, to be read to the jury as evidence.

Upon the correctness of these rulings, the case turns in this Court.

There is nothing in the plaintiffs' complaint, indicating

that their cause of action had any connection whatever with the contract for the purchase of the mills, stock of materials, &c.; and as the evidence is not upon the record, nothing appears from which this Court can infer such connection.

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This fact, of itself, renders it impossible for us to decide that damages for refusing to comply with an arbitration-bond, touching the differences growing out of that contract, would in this case, if indeed they could in any other, be made matter of recoupment; and, certainly, they could not be matter of set-off. They were not liquidated, and must be entirely uncertain. But another answer is, that the proper mode of recovering them must be a suit upon the bond.

As to the claim for use and occupation of the mills, &c., the defendant, in his answer, shows that the occupation was under a contract of purchase; that that contract had been rescinded, and the property received back by him. Under such a state of facts, nothing could be recovered as rent or for use and occupation. *Newby v. Vestal*, 6 Ind. R. 412.

As to the rejection of the deed as evidence, there is nothing showing its relevancy to the case made. Hence, we cannot say it was error to reject it.

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

HANNA, J., was absent.

D. E. Williamson, J. D. Howland, and J. A. Matson, for the appellant.

W. M. Franklin, for the appellees.

CRABB, Administrator, v. ATWOOD and Others.

Petition for the removal of an administrator, filed in vacation. Upon the filing, the clerk gave notice of the pendency of the suit by publication.

Held, 1. That an order of Court for such publication was unnecessary.

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2. That the record being silent upon the subject, it may be presumed that the notice was issued upon a proper affidavit.

3. No citation was necessary.

Though the notice was for the *January* term, the hearing might be had under such notice at the *April* term, if the cause was regularly continued.

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June 1.

APPEAL from the *Bartholomew* Court of Common Pleas.

DAVISON, J.—The appellees, who were the plaintiffs, on the 24th of *November*, 1855, filed in the office of the clerk of said Court a petition wherein they allege that *John Crabb* is the administrator of *Strawder Crabb*, deceased; that the intestate, in his lifetime, was indebted to the plaintiffs, which debt is due and unpaid, and that said administrator has never made and returned an inventory and sale-bill of the intestate's estate, though more than one year has elapsed since the date of his appointment. The plaintiffs, therefore, demand his removal from the administration of the estate, and the appointment of another administrator.

The record shows that upon the filing of the petition, the clerk issued a notice for publication, whereby the defendant was notified of the pendency of the suit, and that an application, founded on the petition, would be made for his removal as such administrator, on the first day of the then next *January* term of said Court. It is not shown that any action was had in the case at that term; but at the *April* term, 1856, the plaintiffs proved publication, &c. Whereupon the defendant moved to dismiss the suit, for want of sufficient notice, and his motion being overruled, he excepted. He then demurred to the petition; but his demurrer was also overruled; and thereupon he filed his answer to which there was a demurrer sustained. On final hearing, the Court ordered that the defendant be removed from his trust as administrator, &c.

As the refusal to dismiss the suit is the only ruling to which the defendant excepted, that alone will be noticed. The grounds relied on in support of the exception, are these: 1. No citation was issued. 2. Publication was not ordered by the Court. 3. Notice having been given for

the *January* term, the cause, under such notice, could not be properly heard at the *April* term. Neither is well taken.

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The statute says that where it is shown by affidavit that a cause of action exists against any defendant, &c., and that he is a non-resident of the state, or being a resident has departed therefrom with intent to defraud his creditors, or to avoid process, or keeps himself concealed therein with a like intent, the clerk, by order of the Court, if in session, or in vacation without such order, shall cause notice of the pendency of the action to be published, &c. 2 R. S. p. 35, § 38.

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Here, the petition was filed in vacation, and upon the filing thereof, the clerk issued the notice by publication; hence, an order of the Court directing such publication was unnecessary; and the record being silent on the subject, we will presume that the notice was issued upon the proper affidavit. And the mere fact that the state of the case required notice by publication, at once shows that a citation was not requisite, because it would have been unavailing.

It is true, the notice was for the *January* term; but the cause was pending in the Court, and there being no evidence that it was otherwise disposed of at that term, we must intend that it was regularly continued, and, therefore, regularly in Court at the *April* term.

Per Curiam.—The judgment is affirmed with costs.

W. Herod and *S. Stansifer*, for the appellant.

C. E. Walker, for the appellees.

BLANKENSHIP v. ROGERS.

In a suit upon a protested order, the plaintiff is not bound to allege and prove notice of non-payment, if he allege and prove that, at the date of the order, the drawee had no effects of the drawer in his hands, save the amount paid and credited on the order, on presentment.

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In such a suit by *A.* against *B.*, the defendant cannot plead a note executed by *A.* and *C.*, jointly, as a set-off.

Touching the mutuality of the debt sued on, and that pleaded as a set-off, the code does not change the law.

APPEAL from the *Morgan* Court of Common Pleas.

DAVISON, J.—*Rogers* was the plaintiff below, and *Blankenship* the defendant. The complaint alleges that the defendant, on the 17th of *September*, 1852, was indebted to the plaintiff on settlement for work and labor 96 dollars, for which at that date, he, defendant, made his instrument in writing, commonly called an order, and thereby requested one *Jefferson Wampler* to pay the above amount to the plaintiff; that afterwards, the order was presented to *Wampler*, the drawee, who paid thereon 37 dollars and 71 cents, and as to the residue, protested it for want of effects in his hands belonging to the drawer, whereof the defendant had notice, &c. It is averred that, after deducting the amount paid by the drawee, there remained due on the order 65 dollars.

The instrument sued on is as follows:

"*Gosport*, *September*, 17th, 1852. *Mr. Jefferson Wampler*: Please pay *John Rogers* 96 dollars, and charge the same to my account, and oblige yours, &c.; it being his part for doing your work. [Signed,] *Perry M. Blankenship*."

The following are the indorsements on the order: "*October* 29. Received on the within, 35 dollars. *October* 5. Received 2 dollars and 71 cents. *October* 5, 1853, I protest the remainder of the within order. [Signed,] *Jefferson Wampler*."

The answer contains four paragraphs. The first denies that defendant was indebted to plaintiff on settlement, for work and labor, or otherwise; says that defendant and plaintiff, jointly, built a house for *Wampler*, the drawee, and that defendant gave the order, not because he was indebted to the plaintiff, but to inform the drawee of an understanding then existing between defendant and plaintiff, viz., that plaintiff was entitled to receive of *Jefferson Wampler* 96 dollars—that sum being a balance due from him to

them. The second avers that defendant knows nothing of the presentation of the order to the drawee, or of its protest by him, save what he learns from the complaint, and therefore he demands proof, &c. The third paragraph avers that *Wampler*, the drawee, was indebted to defendant and plaintiff, jointly, for building the house, in the amount stated in the order whereof the plaintiff had notice, &c. And the fourth, by way of set-off, alleges that plaintiff is indebted to defendant 49 dollars, by two promissory notes, executed by plaintiff and one *Hallick*, dated *September 24, 1849*, payable to *Hezekiah Wampler*, at one and two years, and by him, on the 18th of *January, 1854*, assigned to the defendant.

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The plaintiff demurred to the first, third and fourth paragraphs; but his demurrers were overruled.

The Court tried the cause and found for the defendant 58 dollars; and having refused a new trial, rendered judgment, &c.

To sustain his action, the plaintiff, upon the trial, gave in evidence the order with its indorsements, as set forth in the complaint, and then produced *Jefferson Wampler*, the drawee, who testified that when the order was drawn he was indebted to the defendant for work by him and others done on witness's house, to the amount which he paid plaintiff, and which is indorsed on the order, and no more; that witness contracted with defendant to do the carpenter's work on his house, and when the contract was made he told defendant that he should probably want the plaintiff to work on it, at least to the amount of an account which witness held against him; that he does not recollect the exact amount of the account, but thinks it was not over 25 dollars; that plaintiff and defendant both worked on the house; that defendant seemed "to boss the work;" that witness knew nothing of their being in partnership in regard to the work, but had frequently seen them working together.

Hendricks, another witness, testified that in *September, 1849*, plaintiff and one *Hallick* told him that they were in partnership in the carpenter business.

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The plaintiff having rested, the defendant gave in evidence the notes and indorsements described in the fourth paragraph. They read thus:

"Sept. 24, 1849. One year after date we promise to pay to the order of *Hezekiah Wampler* twenty-nine dollars and fifty cents for value received. [Signed,]

"*John Rogers,*

"*William Hallick.*"

"Jan'y 18, 1854. I assign the within note to *Perry M. Blankenship*. [Signed,] *Hezekiah Wampler.*"

"Gosport, Sept. 24, 1849. Two years after date we promise to pay to the order of *Hezekiah Wampler* twenty-nine dollars and fifty cents for value received. [Signed,]

"*John Rogers,*

"*William Hallick.*"

"I assign the within note to *Perry M. Blankenship*.

[Signed,] "*Hezekiah Wampler.*"

The evidence, it will be seen, proves that the contract for building the house was made by the defendant in his own name, but fails to show any partnership between him and the plaintiff. Hence, it must be inferred that the work which the plaintiff did on the house was done under the employment of the defendant, and that the order was given to the plaintiff for the amount of his services as such employee. It cannot, therefore, be assumed that the order was drawn for the mere purpose of informing the drawee of an arrangement between the drawer and payee, as alleged in the first defense. This conclusion seems to be consistent with the evidence, and not in conflict with the language of the instrument sued on.

But it is insisted that the plaintiff, having failed to allege and prove notice of the non-payment of the order within a reasonable time after it was presented, cannot sustain his action. There is nothing in this objection. The complaint avers, and the evidence proves, that the drawer, at the date of the order, had no effects in the hands of the drawee save the amount paid and credited at the time of its presentation; and such being the case, the failure to notify the drawer of non-payment did not discharge him of liability.

We are referred to *Dumont v. Pope*, 7 Blackf. 367; but that case, so far as it may have any bearing upon the point under consideration, simply decides that "a statement in the protest of an inland bill for non-acceptance that the reason given by the drawee for non-acceptance was that he had no effects of the drawer, is no evidence of the want of effects," while in the case before us it was sufficiently proved, by competent evidence, that the drawee, at the time the order was drawn and presented, had no effects of the drawer over the amount credited upon the instrument in suit. The case cited is therefore not applicable.

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ROGERS.

It remains to be considered whether the defendant was entitled to set off the notes described in the answer. These notes were executed jointly by *Rogers*, the plaintiff, and one *Hallick*, who assigned them to the defendant. It is conceded that prior to the revision of 1852, they would not have been a proper set-off, because the debt of which they are evidence, and that sued for, are not mutual. Still, it is insisted that the law of set-off, now in force does not require such mutuality.

By the present code, it is provided that set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of a debt, duty or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." 2 R. S. p. 39, § 57. This provision, it is true, does not require the debt pleaded in set-off, and that sued on, to be mutual. Still, it seems to us, that the legislature did not intend to allow such defense where a separate action could not be maintained against the plaintiff, for the debt proposed to be set off. In this instance, the plaintiff and another are jointly bound for the payment of the notes set up in the answer; hence, it is evident that the defendant could not, in an ordinary suit upon the notes, recover without making both the joint promisors parties. It seems to follow that the proposed set-off was not allowable. Indeed, the word "set-off," as used in the statute, involves the requirement of mutuality; and it may be correctly assumed that, in respect to such require-

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ment, the law of set-off remains as it stood prior to the revision of 1852. The result is, that the Court, in its refusal to allow the set-off, committed no error.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

W. R. Harrison, for the appellant.

FITZGERALD v. JEROLAMAN.

Tuesday,
June 1.

APPEAL from the *Cass* Court of Common Pleas.

Per Curiam.—Suit upon promissory notes. Answer and reply. Trial by jury, judgment for plaintiff.

We are not able to discover any error in the case.

The Court was asked to give a legal instruction in the cause. The instruction was refused, and an exception entered. But the reason of the refusal of the instruction is not given, nor does the record exclude the presumption that it may have been refused for a sufficient reason. It should do so.

An instruction asserting a correct legal principle may be rightly refused for any one of at least three reasons—

1. That it is not pertinent to the particular case, as made by the evidence.

2. That it was not handed up to the judge for his examination at a proper time.

3. That it was clearly embraced in instructions given.

It is shown, in this case, that the instruction in question was pertinent to the case made by the evidence.

It is not shown that it was handed up to the judge a sufficient time before the jury, according to the usual practice in causes, were to be instructed.

It is not shown that the instruction was not included in the instructions given, as the record does not purport to contain them all, and there is no allegation that it was not so included.

The judgment is affirmed with 2 per cent. damages and costs. May Term,
1858.

L. Chamberlin, for the appellant.

HOWES
v.
HALLIDAY.

FRENCH v. HOWARD.

APPEAL from the *Ohio* Circuit Court.

*Tuesday,
June 1.*

Per Curiam.—Suit upon a note. Answer, setting up particular facts tending to show a failure of consideration. Reply, avoiding some of those facts by new matter, and denying the existence of others.

The Court gave the opening and close upon the trial to the plaintiff. This was right. The new matter in avoidance of the answer gave the plaintiff the affirmative.

The Court refused two instructions. The refusal might be sustained in this Court on the grounds given in *Fitzgerald v. Jerolaman*, at this term (1). But the Court gave a correct instruction in place of those refused.

The record does not purport to contain all the evidence.

The judgment is affirmed, with 1 per cent. damages and costs.

D. S. Major, for the appellant.

W. S. Holman, for the appellee.

(1) The case next preceding.

HOWES and Another v. HALLIDAY.

APPEAL from the *Tippecanoe* Circuit Court.

*Tuesday,
June 1.*

Per Curiam.—This was an action by the appellants against the appellee on the indorsement of two promissory

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MURPHY.

notes. Trial by the Court, finding and judgment for defendant. Motion for new trial made and overruled, and exceptions taken; but no written reasons for a new trial were filed in the Court below. There is, therefore, nothing before us to be determined. *Madison, &c., Railroad Co. v. Franklin Township*, 8 Ind. R. 528.—*Lagro, &c., Plankroad Co. v. Eriston*, at the present term of this Court (1).

The judgment is affirmed with costs.

H. W. Chase and *J. A. Wilstach*, for the appellants.

E. H. Brackett, for the appellee.

(1) *Post*, 342.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY
 v. WILLIAMS.

Tuesday,
 June 1.

APPEAL from the *Shelby* Court of Common Pleas.

Per Curiam.—Appeal dismissed in the Common Pleas for want of a sufficient appeal-bond. The dismissal was wrong. The case is decided by *Carmichael et al. v. Holloway*, 9 Ind. R. 519—a case exactly in point.

The judgment is reversed with costs. Cause remanded for trial.

J. S. Scobey and *W. Cumback*, for the appellants.

DRONBERGER v. MURPHY.

Tuesday,
 June 1.

APPEAL from the *Bartholomew* Circuit Court.

Per Curiam.—Complaint on note. Answer. Demurrer to answer sustained. Refusal to answer further. Final judgment for plaintiff. No exception taken.

The judgment is affirmed with costs (1).

M. M. Ray and *T. A. McFarland*, for the appellant.

W. F. Pidgeon, for the appellee.

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MARTIN
v.
SMITH.

(1) See *Jolly v. The Terre Haute Drawbridge Co.*, 9 Ind. R. 417, 421.

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COPELAND v. COPELAND and Another.

THE SAME v. TOLER.

APPEAL from the *Shelby* Court of Common Pleas.

Tuesday,
June 1.

Per Curiam.—These cases turn upon the construction of a will. And as the entire will is not copied into the record, we are not able to give an opinion as to the correctness of the ruling below.

The judgment is affirmed with 5 per cent. damages and costs.

M. M. Ray and *T. A. McFarland*, for the appellants.

J. S. Scobey and *J. Gavin*, for the appellees.

MARTIN v. SMITH and Another.

APPEAL from the *Delaware* Circuit Court.

Tuesday,
June 1.

Per Curiam.—This was a bill in chancery to foreclose a mortgage. The suit was commenced in 1851, but the pleadings were not perfected and issues joined until the *March* term of the Court, 1854. The cause was then submitted to the Court for trial. The Court found for the plaintiffs below, overruled a motion for a new trial, and entered judgment pursuant to the finding.

The appellant complains that the amount found by the

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v.
ERISTON.

Court, was mostly for interest improperly allowed on an open and unsettled account between the parties. There was no exception taken to the overruling of the motion for a new trial, and the record does not purport to contain all the evidence. That, in such a case, there is nothing before us to authorize an examination of the matter complained of, is too well settled to require the citation of authorities.

The judgment is affirmed with 5 per cent. damages and costs.

T. J. Sample, for the appellant.

W. March, for the appellees.

LAGRO, MARION AND JONESBORO PLANKROAD COMPANY v.
ERISTON.

Tuesday,
June 1.

APPEAL from the *Grant* Court of Common Pleas.

Per Curiam.—Action to recover toll for passing over plaintiffs' road.

Trial by Court and finding for defendant. Motion for new trial made and overruled, exceptions taken, and judgment on the finding.

There were no written reasons for new trial filed in the Court below. In accordance with the decisions of this Court heretofore made, there is nothing before us to be determined. *Madison, &c., Railroad Company v. Franklin Township*, 8 Ind. R. 528.

The judgment is affirmed with costs.

J. Brownlee, for the appellants.

I. Van Devanter and *J. F. McDowell*, for the appellee.

DEWEESE *v.* THE STATE on the relation of STARR.

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1858.

APPEAL from the *Harrison* Circuit Court.

TRITTIPO
v.
THE STATE.

Per Curiam.—The questions presented in this case are precisely similar to those presented in *Howard v. The State*, Tuesday, June 1. &c., decided at the present term (1). And for the reasons given in that case the judgment in the case at bar must be affirmed.

The judgment is affirmed with costs.

W. T. Otto and *W. Q. Gresham*, for the appellant.

D. M. Donald and *A. G. Porter*, for the state.

(1) *Ante*, 99.

MOORE *v.* MOORE.

APPEAL from the *Jennings* Circuit Court.

Tuesday,
June 1.

Per Curiam.—Suit by the plaintiff, against the defendant, as executor *de son tort*, to recover a demand. Judgment for the plaintiff. 2 R. S. p. 249, and note.

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Case	1
163	163

The case turns on the evidence.

The judgment is affirmed, with 1 per cent. damages and costs.

H. C. Newcomb and *J. S. Harvey*, for the appellant.

L. Waldo and *J. W. Gordon*, for the appellee.

TRITTIPO *v.* THE STATE.

A conviction for a riot, upon regular proceedings before a justice of the peace, bars a prosecution for the same offense in the Common Pleas.

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v.
THE STATE.

Wednesday,
June 2.

APPEAL from the *Hamilton* Court of Common Pleas.
HANNA, J.—On the 6th day of *January*, 1857, an affidavit was made by one *Davidson* before *Hooker*, a justice of the peace of *Hancock* county, charging the appellant and others with a riot. On the 7th, the affidavit was filed in the office of the clerk of the Court of Common Pleas of that county, who, on the same day, issued a writ for the defendants, which was served by the sheriff on the 13th, being the same day on which an information was filed by the district attorney, based upon such affidavit.

On the 9th of *January*, this defendant and others, against whom the first affidavit was made, went before *Wright*, another justice of the peace of said county, who issued a writ for their arrest, based upon an affidavit then filed by one *Andrew J. Trittipso*, charging them with a riot, which is, in the progress of the cause, shown to be the same offense for which the first affidavit was filed. Upon this they were arrested, and this defendant, among others, on a plea of guilty, was, by justice *Wright*, fined five dollars, &c. The testimony of witnesses was heard by the justice upon the plea of guilty.

A change of venue was granted, of the cause pending upon information, from the Common Pleas of *Hancock* to the Common Pleas of *Hamilton* county. There, on a separate trial upon a plea of not guilty, the appellant admitted before the jury that he had been guilty of a riot, but relied for his defense upon an alleged former conviction for the same offense.

Were the proceedings before justice *Wright* a bar to the prosecution in the Common Pleas?

That the judgment rendered by justice *Wright* is a bar, if fairly obtained, is settled by the case of *Bruce v. The State*, 9 Ind. R. 206.

The evidence is not in the record, except that bearing upon the alleged former conviction; and upon a careful examination of that, we are of the opinion that it was not sufficient to have justified the jury in finding that such proceedings were not legitimate and in good faith. A new trial should have been granted.

Per Curiam.—The judgment is reversed. Cause remanded, &c. May Term, 1858.

D. Moss, for the appellant.

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v.
GREGORY.

COATS v. GREGORY, Executor.

Where a plaintiff offered in evidence a letter written by himself, in which he attempted to charge the defendant with certain sums, as being due by the defendant's admission contained in other writings,—*Held*, that the plaintiff should have produced those writings, to enable the jury to decide from the tenor of the whole whether he had placed a proper construction upon them. The admission of additional evidence, after the examination has closed and the argument commenced, is within the discretion of the Court; and the decision of the Court below in such cases, will not be disturbed by this Court, unless there appears to have been an abuse of the discretionary power.

In a suit upon an unsettled account, the proof must go to the separate items; and evidence tending to show that the defendant is indebted to the plaintiff in some amount, is not sufficient to entitle the plaintiff to a verdict.

APPEAL from the *Warren* Court of Common Pleas. *Wednesday, June 2.*

HANNA, J.—This action was commenced by filing with the clerk a claim against the deceased, sworn to under the statute, in the form of an open account for money paid, goods, wares, &c., sold.

At the proper time, the executor filed his answer of three paragraphs. They were, 1. A denial; 2. Payment; 3. That plaintiff and deceased were partners in the mercantile business, and in the lifetime of deceased, said plaintiff received of deceased all his share of the cash, notes, accounts and property of said firm, except those which were wholly insolvent.

To the second paragraph there was a general denial filed by way of reply; and to the third, there was a denial of the partnership, and of the reception of plaintiff's "share of the notes and accounts and property of the said firm," in the same paragraph.

There was a trial by jury. Verdict for defendant. New

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1858.

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v.
GREGORY.

trial granted. At a subsequent term a second jury trial was had, and second verdict for defendant. The evidence is in the record.

The plaintiff caused the executor to be subpoenaed as a witness, and to produce as evidence letters received by the deceased from the plaintiff, in regard to the business out of which this suit grew. The letters were produced, but when offered by the plaintiff as evidence, objection was made by the defendant, and the evidence was excluded. This ruling of the Court is complained of. The first letter offered was one dated *September* 16, 1850, and purports to be an answer to one from deceased to plaintiff, dated on the 2d of the same month, and to give extracts therefrom, as well as from other letters received prior to that time, and also from statements furnished by deceased to plaintiff. No offer was made to produce and give in evidence the letters and statements from which the extracts purported to have been taken. The letter and extracts therein contained would have had a tendency to produce the impression upon the jury that the deceased was indebted to plaintiff. If the whole of the letters, &c., from which the extracts were taken, had been given to the jury, such an explanation may have been contained therein as would have prevented the jury from coming to that conclusion. When the plaintiff offered in evidence a letter written by himself, in which he attempted to charge the deceased with certain sums as being due, by admissions of the deceased contained in other writings, it would, to say the least of it, have looked more like fair dealing to have produced those writings, and let the jury judge from their whole tenor whether a proper construction had been placed upon them by him. 1 Greenl. Ev. § 201, and note.

The plaintiff, after the evidence had been closed and the argument had been commenced, offered to read in evidence a letter from the deceased to the plaintiff, which was not permitted by the Court. The permission to introduce additional evidence, under similar circumstances to those existing at the time of this offer, is purely the exercise of the discretionary power of the judge presiding at the trial.

And although it is important to the ends of justice that such legal discretion should be soundly exercised, the ruling of the judge, who has all the facts and circumstances immediately before him, will not be disturbed by this Court, unless it appears that there has been an abuse of such discretionary power. There is nothing in this case to show us that there was such abuse.

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v.
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The third instruction given by the Court to the jury, upon the request of the appellee, involves this legal principle, to-wit: that in a suit upon an unsettled account, the proof must go to the separate items of the account; and evidence tending to show that the defendant was indebted to the plaintiff in some amount, is not such proof as is required to entitle the plaintiff to a verdict. It is urged that this instruction is in conflict with the decision of this Court in the case of *Spencer v. Morgan*, 5 Ind. R. 146.

We think the appellant mistakes the bearing of that case, or its application. The effect of the instruction in that case was to leave the question to the jury, as to whether the facts and circumstances in evidence established the claim, although there was not positive proof in regard to each item. The verdict was not disturbed because there was some evidence conducing to prove the whole demand.

In the case at bar, the plaintiff, upon failing to make proof of the items of his account, attempted to resort to evidence which would, perhaps, have been proper to sustain a paragraph upon an account stated. The instruction under consideration is directed to that point. The claim here filed is for money, goods, wares and merchandise. Suppose, upon a failure by the plaintiff to prove any of his items, he should be permitted to prove the general admission of deceased that he owed him 100 dollars, and recover that sum, when in fact he owed him nothing, upon the items upon which the claim was founded, but did owe that sum for a horse; would the recovery be a bar to a proceeding for the value of the horse? We think it would not, for the reason that the record would not show any claim for that kind of property, nor would there have been any proof about such.

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v.
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Under the peculiar circumstances of this case the instruction was not erroneous.

Per Curiam.—The judgment is affirmed, with costs.

R. A. Chandler, for the appellant.

B. F. Gregory and *J. Harper*, for the appellee.

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RAGAN v. HAYNES.

The Circuit Court having general jurisdiction, an objection to its jurisdiction must be raised by answer.

Where the Court below has taken jurisdiction and rendered judgment, the presumption, on appeal to the Supreme Court, is in favor of the jurisdiction. Section 613 of the civil procedure act, 2 R. S. p. 168, has reference only to actions brought against a defendant not in possession, to quiet title, and not to cases where the defendant is alleged to be in possession and withholding the same, yet suffers judgment to be taken against him without answer.

Wednesday,
June 2.

APPEAL from the *Hendricks* Circuit Court.

HANNA, J.—This was an action by *Haynes*, to recover of *Ragan* ten acres of land.

Ragan suffered judgment to go by default. He now appeals, and assigns two errors:

1. That the complaint is not sufficient.

2. That the judgment is erroneous for two reasons: first, because it does not show that the Court had jurisdiction of the subject-matter, and second, *Ragan* should have recovered costs.

It is urged upon the part of the appellant, that neither the complaint nor the judgment shows that the land sought to be recovered is situated in the county of *Hendricks*, and that such fact should be shown affirmatively.

There is no direct allegation that the land is situated in *Hendricks* county. The section, township and range in which the land is situated, are given both in the complaint and judgment, and it is insisted upon the part of the appellee, that the Court is bound to take notice that the congressional subdivisions named are within the boundaries

of that county; and that to plead facts sufficient to show that the land is within the county, is equivalent to a direct allegation that it is therein situated.

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In *Brownfield et al. v. Weicht*, 9 Ind. R. 394, it is held that a similar complaint is unobjectionable, because the Circuit Court had general jurisdiction, and the want of jurisdiction must be raised by answer, &c. The Court having, in the case at bar, taken jurisdiction and rendered judgment, we are bound to presume in favor of that jurisdiction, without stopping to determine whether we would, if the proceeding had been in a Court of limited jurisdiction, take notice of the congressional subdivisions of land included within the county of *Hendricks*, or not.

As to the question of costs, we think the statute referred to, (§ 613, 2 R. S. p. 168,) has reference only to actions brought against a defendant not in possession, to quiet title, and not to cases where, as in the one at bar, the defendant is alleged to be in possession and withholding the same, and yet suffers judgment to be taken against him without answer.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

C. C. Nave and *J. Witherow*, for the appellant (1).

H. C. Newcomb, *J. S. Harvey* and *J. S. Miller*, for the appellee (2).

(1) Counsel for the appellant made the following points:

1. The complaint must show in what county the land sued for lies. 2 R. S. p. 33, § 28.

2. It must state that the plaintiff is entitled to the possession; and the premises must be properly described. 2 R. S. p. 166, § 595.

3. In all actions in which the subject or thing to be recovered is in its nature local, (and actions of ejectment, or, under our code, for the recovery of possession of real estate are of that class,) the place, as the parish, county, &c., where the subject of the action is situate, must be stated in the complaint. Gould's Pl. § 106.

4. Courts of limited jurisdiction are those which are circumscribed in the exercise of their powers within certain local bounds, as a town, city or county. Van Santv. Pl. p. 376.—*Brown v. Keene*, 11 Curtis (U. S. S. C.) 41, 8 Pet. 112.—*The Chemung Canal Bank, v. Judson*, 4 Seld. 254. And the jurisdiction of such Courts must be affirmatively shown.

(2) Counsel for the appellee cited 1 R. S. p. 178, § 32, defining the boun-

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JOHNSTON
v.
NIEMEYER.

daries of *Hendricks* county, to show that the complaint, (which contained a description of the premises, giving the section, township and range,) sufficiently showed the jurisdiction.

JOHNSTON v. NIEMEYER.

Suit commenced before a justice of the peace for a balance due on a promissory note. Answer payment. The defendant offered in evidence two orders drawn by him in favor of the plaintiff after the note was due, which he had proven to have been paid. He also offered to prove that the plaintiff had, since the note was due, received from the defendant 8,000 bricks. *Held*, that as the note was a money contract, and the transactions of which proof was offered were had after the breach of that contract, it was necessary to prove not only an agreement to receive the orders and bricks, but a reception of them by the creditor, as a payment or satisfaction of the note; and for that purpose the evidence was admissible under the general issue, to the benefit of which, by the statute, the defendant was entitled.

Wednesday,
June 2.

APPEAL from the *Marion* Court of Common Pleas.

HANNA, J.—This was a suit commenced before a justice of the peace for a balance due on a note dated *September* 16th, 1854, due ten days after date. The defendant put in a general answer of payment. Judgment for the plaintiff. The defendant appealed to the Common Pleas. Jury trial, finding and judgment for the plaintiff.

Johnston, who was the defendant below, complains that the Court improperly rejected evidence offered by him upon the trial. This is the only question in the case. The evidence offered consisted, first, of two orders drawn by *Johnston*, after the note sued on was due, in favor of *Niemeyer*, on a third party, having first proven that said orders were paid at the dates thereof to said plaintiff, but witnesses stating that they knew nothing of the notes sued on; and secondly, one *Miller* was offered as a witness to prove that, at the request of the plaintiff, and on his account, the witness got of the defendant, after the note sued on was due, eight thousand bricks, nothing being said by plaintiff or defendant about the same being a payment on the note

sued on; but that the plaintiff, at the same time, stated to witness that the defendant was owing him, and he could not get any money out of him, and therefore he wished him to take the bricks.

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v.
NIEMEYER.

Was the evidence admissible under the pleadings?

The act regulating the powers and duties of justices of the peace provides that "all matters of defense, except the statute of limitations, set-off, and matter in abatement, may be given in evidence without plea;" and that "matters of set-off claimed by the defendant, shall be filed in writing before entering upon the trial," &c. 2 R. S. p. 455, §§ 34, 36. A set-off is defined by the statute to "consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." *Id.* p. 39, § 57. It is clear from this statute, whatever may have been the practice before its adoption, that if the defense attempted to be set up in proof, was properly matter of set-off alone, it should have been "filed in writing," and should have been "set forth with the same certainty required in the complaint of the plaintiff." § 36, *supra*. The degree of certainty required in the complaint is declared in the preceding section to be, "a statement of the grounds of his complaint, or the written instrument which is the foundation of his suit." In this case we have an answer alleging payment, generally; but no set-off pleaded. This Court has heretofore held that payment may be made in any thing that the creditor will accept as payment (4 Ind. R. 570; 8 Ind. R. 254); and that proof may be given of such payment having been made and received, either under a general plea of payment, or the general issue. In the same case (*Louden v. Birt*, 8 Ind. R. *supra*) it was held that it is a question for the jury whether what may have been given and received was a payment or not, in the particular case. As the note was a money contract, and the transactions of which proof was offered were after the breach of that contract, it was necessary to prove not only an agreement to receive, but the reception by the creditor, as a payment or satisfaction, of the orders

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NETTLETON,

EX PARTE.

and bricks. 4 Ind. R. 469. In that form, the evidence was admissible under the general issue—to the benefit of which the defendant was entitled under the statute (4 Ind. R. 76)—and should have been considered by the jury in determining whether there was such agreement.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. L. Ketcham and *I. Coffin*, for the appellant.

NETTLETON, Guardian, *Ex parte*.*

The Court cannot refuse a guardian's claim for services, because he does not show that he has not used the money in his hands.

Wednesday,
June 2.

APPEAL from the *Posey* Court of Common Pleas.

DAVISON, J.—*Nettleton* as guardian, &c., on the 4th of *March*, 1857, made his report to the Common Pleas, thereby showing a balance of 8,273 dollars in his hands belonging to his ward, which report, with the exception of one voucher embracing the charge of the guardian for services, was confirmed. The voucher disallowed by the Court is as follows:

“Number 4. *Hudson T. Parke*,

“To *Nelson G. Nettleton*, Dr.

“To administering the estate and superintending the education of said *Parke*, my ward, from the first of *September*, 1855, to *March* the first, 1857—

eighteen months, at 50 dollars per year, - - \$75 00

“*N. G. Nettleton*.”

“Subscribed and sworn to before me this 5th day of *March*, 1857. *T. Nelson*, Clerk.”

The record says that the Court refused to allow the

* Two other cases with the same title, and precisely like this were decided this day.

voucher, because the guardian does not show that the above balance of 8,273 dollars was not used by himself.

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We have a statute which enacts that every guardian shall be allowed by the Court settling his accounts, the amount of all his reasonable expenses incurred in the execution of the trust, and also such compensation for his services as the Court shall deem reasonable. 2 R. S. p. 328, § 25.

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V.
THE STATE.

Thus, it will be seen, that the Court is in duty bound to allow the guardian some compensation; and we are not advised of any rule of law that requires him, upon his application for such allowance, to show that the money which he reports to be in his hands was not used by himself. True, a claim for services, presented by the guardian, so far as the Court may deem it unreasonable, when compared with the services actually performed, should be refused; but its refusal for the reason stated in the record, is not a correct exposition of the law.

There is a bill of exceptions which contains the evidence in the case. It was clearly proved that 75 dollars was not an over-estimate of the guardian's services; and in our opinion he was entitled to that amount of compensation.

Whether a guardian who has used in his own private business his ward's money, is liable for interest, or otherwise liable, are questions not before us.

Per Curiam.—The order of the Court refusing the above voucher is reversed. Cause remanded, &c.

A. P. Hovey, for the appellant.

LONG v. THE STATE on the relation of CASE.

In a process *Ung* for surety of the peace, a verdict that the defendant is guilty, is insufficient under the statute.

APPEAL from *Switzerland* Court of Common Pleas. *Wednesday,*
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v.
THE STATE.

DAVISON, J.—The complaint in this case is in the form of an affidavit. It was originally filed before a justice of the peace, and is as follows:

“*Eliphalet Case* swears that he has just cause to fear, and does fear, that *James M. Long* will by violence injure his property, as he has made threats to shoot his cattle; and that he makes this affidavit only to secure the protection of the law, and not from anger or malice.”

The justice, having required *Long*, the defendant, to enter into the usual recognizance, certified the proceedings to the Common Pleas; and in that Court the cause was submitted to a jury who returned the following verdict: “We the jury find the defendant guilty.” Thereupon the defendant moved in arrest of judgment; but the Court refused his motion, and rendered final judgment, &c.

The only question to settle in the case relates to the sufficiency of the verdict. Does it respond to the issue?

The statute upon which the proceeding for surety of the peace is based, enacts that the issue to be tried, in such case, shall be *whether the complaining witness has just cause to entertain the fears expressed in his affidavit*, which issue shall be tried by the justice, unless either party demand a jury, &c.; and that a transcript of the proceedings before the justice being by him filed in the clerk’s office, such cause shall be docketed and tried in the Common Pleas, under the rules governing such trials before justices; and that if the finding of the Court or the verdict of the jury be against the defendant *on the issue*, such Court shall require of such defendant a recognizance, &c. 2 R. S. pp. 500, 501, §§ 23, 25, 26.

The statute thus defines the issue, and the jury simply find the defendant guilty. This seems to be too indefinite to meet the requirements of the statute. The defendant may have been guilty of the threats charged in the complaint, and still they may have been made under circumstances and feelings not calculated to induce the fears expressed in the affidavit. At all events, the principle that the verdict must respond to the issue is too well settled to

admit of controversy. In this instance, it evidently fails to do so. Hence the motion in arrest should have been sustained.

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v.
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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. Carter and C. Gazlay, for the appellant.

AUSMAN and Wife v. VEAL:

Suit for slander. The words alleged to have been spoken of the plaintiff were as follows: "She [meaning said *Mary*] is out gathering up news. She [meaning said *Mary*] has run all over the neighborhood telling tales on my [meaning defendant's] family. She [meaning said *Mary*] can talk as much as she pleases. Thank *God* if my [meaning defendant's] daughters did have bastards, they [meaning defendant's daughters] never had pups. She [meaning said *Mary*] did have pups in *Ohio*, and it can be proved. She [meaning said *Mary*] had two pups by a haystack,"—thereby meaning that she had been guilty of bestiality, or the crime against nature, &c. Demurrer sustained. The objections to the complaint were, 1. That the innuendo is in the disjunctive, in that it alleges an intention to charge bestiality or the crime against nature. 2. That the words charge an impossible crime and an impossible fact.

Held, 1. That both sodomy and bestiality may be embraced by the term "crime against nature;" but that sodomy is generally meant by the use of that term.

2. That the first objection is invalid; for an inference expressed in the colloquium or innuendoes in a complaint for slander, if not correct from the words averred to have been spoken, cannot affect the sufficiency of such averment.

3. That the Court cannot say that sexual connection between a dog and a woman is impossible, nor that if possible, conception might not follow; but if such connection and conception are impossible, it is not known to the people; and the people, though bound to know the law, are not bound to know philosophy or the facts and principles of science: hence, the injury to the plaintiff would not be affected by the truth or falsity of such facts or principles.

Snyder v. Degant, 4 Ind. B. 578, overruled.

APPEAL from the *Miami* Circuit Court.

Wednesday,
June 2.

PERKINS, J.—Suit for slander. Demurrer to the complaint sustained, and judgment for the defendant.

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AUSMAN
v.
VEAL.

The complaint is by *Eli Ausman* and his wife *Mary*, and charges that in a certain discourse held at, &c., to-wit, on the 27th of *June*, 1857, concerning the chastity of the said *Mary*, and concerning her having had sexual connection with a dog, in presence, &c., the defendant said: "She [meaning the said *Mary*] is out gathering up news. She [meaning said *Mary*] has run all over the neighborhood telling tales on my [meaning defendant's] family. She [meaning said *Mary*] can talk as much as she pleases. Thank *God*, if my [meaning defendant's] daughters did have bastards, they [meaning defendant's daughters] never had pups. She [meaning the said *Mary*] did have pups in *Ohio*, and it can be proved. She [meaning the said *Mary*] had two pups by a haystack; thereby meaning that she had been guilty of bestiality, or the crime against nature, &c.

The objections to the complaint are—

1. That the innuendo assigning the meaning to the words containing the charge is in the disjunctive, viz., that it was intended to charge bestiality, *or* the crime against nature.

We take it that there is a difference in signification between the terms bestiality, and the crime against nature.

Bestiality is a connection between a human being and a brute of the opposite sex.

Sodomy is a connection between two human beings of the same sex—the male—named from the prevalence of the sin in *Sodom*.

Both may be embraced by the term, "crime against nature," as felony embraces murder, larceny, &c.; though we think that term is more generally used in reference to sodomy. Lev. ch. 18, v. 22, ch. 20, v. 13.—Deut. ch. 23, v. 17.—Rom. ch. 1, v. 27.—1 Cor. ch. 6, v. 9.—1 Tim. ch. 1, v. 10. Buggery seems to include both sodomy and bestiality.

Still, we do not think the objection valid in this case. We do not say that it would be in any case. *Starkie*, in his work on Slander (vol. 1, p. 71), says: "No doubt it would now be held that words imputing a criminal act in

the disjunctive are also actionable." But, however this may be, it was decided by this Court, in *Rodebaugh v. Hollingsworth* (1), that an inference expressed in the colloquium or innuendoes in a complaint for slander, if not a correct inference from the words averred to have been spoken, cannot affect the sufficiency of such averments. This principle applies in the case before us.

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2. It is said that the words charge an impossible crime, and an impossible fact, and thus carry upon their face their own refutation.

It is true that where the words used impute an act which is not a crime, the calling it a crime by the person making the accusation, will not amount to a slanderous charge; as, if a person should say of another, speaking under the common law, "he is guilty of larceny, for he picked apples off of my trees," here, the charge shows on its face that a trespass, not a larceny, was committed, and the misnaming it by the slanderer, will not raise it to a criminal accusation. But "if a person who had no horse were to publish these words: *J. S. hath stolen my horse*—the discredit would be as great to *J. S.* as if the publisher had had a horse; for every person who heareth the words may not know whether he had a horse or no;" and the charge would be actionable. *Starkie, supra*, 77. This shows that *Snyder v. Degant*, 4 Ind. R. 578, decided by this Court, is not law.

Whether the words in the case at bar imply an impossible fact, or impute an impossible crime, we are not able to say. Whether it is physically impossible for sexual connection to take place between a dog and a woman; and whether, could such connection take place, it is a physical impossibility that conception should follow, we are not advised. If such be the case, we do not think it is generally known to the people. They are presumed, bound, indeed, to know the law, but not philosophic, or scientific facts and principles. Hence, we think, the injury to the plaintiff may not be affected by the truth or falsity of such facts and principles, and that this action may well lie.

Per Curiam.—The judgment is reversed with costs. Cause remanded for further proceedings.

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J. M. Wilson, H. J. Shirk and D. D. Pratt, for the appellants (2).

R. P. Effinger and N. O. Ross, for the appellee.

(1) 6 Ind. R. 339.

(2) Counsel for the appellants made the following points:

1. When a slanderous charge is made which the unlearned would understand as imputing a crime, the action of slander lies, although in the nature of things, such a crime could not have been committed, unless it be shown that the charge was made only in the hearing of those who knew that the crime could not be committed. *Kennedy v. Gifford*, 19 Wend. 296.—*Goodrich v. Woolcott*, 3 Cow. 231.—*Peake v. Oldham*, 1 Cowp. 272, 273.—*Woolnith v. Meadows*, 5 East, 463.—*Gorham v. Ives*, 2 Wend. 534.

2. When the words used are of a doubtful construction, and are such that unlearned persons might infer an imputation of a crime against nature committed by the plaintiff, they are actionable; and it should be left for the jury to determine in what sense the words were understood by the hearers. The inquiry is not whether the words *could* have been understood in any other terms, but whether that is the construction which common persons would naturally put upon them. *Roberts v. Camden*, 9 East, 96, *per* Ld. ELLENBOROUGH, C. J.—3 Cow. 239.—5 *id.* 714.

3. Where words from their general import appear to have been spoken with a view to defame a party, the Court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them. 1 Cowp. 272, 273.

4. Where words may be understood in two different senses, one as imputing a crime, and the other not, it is proper to submit the question how they were understood to the jury. *Demarest v. Haring*, 6 Cow. 76.

ROSENTHAL v. THE MADISON AND INDIANAPOLIS PLANK-ROAD COMPANY.

The board of county commissioners being an inferior Court of special and limited statutory jurisdiction, it must appear upon the face of its proceedings that its action was in conformity with the requirements of the statute governing the same.

Thus, an act of 1845 (Laws, p. 54), empowered the county auditor to call special sessions of the board, by giving notice in writing, to each of the commissioners, specifying the purpose for which they are called together; and provided that upon receiving such notice the commissioners should meet and transact the business for which such special session was called. *Held*, in a suit where an order by two commissioners was relied upon (the third not

being present), that it should appear that such notice was given, and that such order was upon the subject-matter named in the notice; for at a special session, the board would have no jurisdiction over any business not specified in the notice calling it.

If the legislature change the name of a corporation without altering its powers or identity, it does not affect a controversy between the company and third parties.

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APPEAL from the *Decatur* Court of Common Pleas.

Wednesday,
June 2.

PERKINS, J.—This was a suit by the *Madison and Indianapolis Plankroad Company*, against *Sampson Rosenthal*, to recover toll and penalties alleged to be due from him to the company. The suit was commenced before a justice of the peace. Judgment in the Common Pleas for the company. Sections 22 and 25, of the charter of the company are as follows:

“SEC. 22. If any person or persons using any of said road, shall, with intent or view to defraud said company, pass through any private gate or bars, or along any other ground near the said road, or shall practice any fraudulent means to lessen the payment of such toll, each and every person concerned in such fraudulent practice, shall for every such offense, forfeit and pay to such company, the sum of five dollars, without any stay of execution, to be recovered by an action of debt, at the suit of the corporation, before any justice of the peace, or other Court having jurisdiction, of the proper county; *Provided*, That nothing in this act shall be so construed as to prevent any person residing on said road, from passing thereon, about their premises between the gates, for common and ordinary business.”

“SEC. 25. Such company may make, enact and publish any and all ordinances and by-laws which they may deem proper, not inconsistent with the laws of this state, in order to regulate the travel upon such roads, and the rules to be observed by persons in meeting or passing with teams and vehicles, and the width thereof, and all other matters, including the times and places of holding elections, which may be deemed for the welfare of such company. Any person violating any ordinance or by-law made by such company, shall forfeit and pay to such company the sum

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COMPANY.

of five dollars, to be sued for and collected according to the provisions of the twenty-second section of this charter."

No by-law of the corporation was set up in the complaint, or given in evidence on the trial. Hence, we must conclude that the suit was upon section 22, above quoted, of the charter.

Being so, it was not, it would seem, sustained by the evidence; and if not, then, indeed, there was no cause of action shown in the complaint, as to the penalties claimed. The complaint alleged that the defendant passed through a gate on the road without paying toll. The proof was that he did so because he denied that the company had complied with certain conditions precedent to their right to take toll. He was not attempting to defraud them of toll admitted to be their due, but to prevent them from collecting toll of him to which he alleged they had no right. If his act did not constitute fraud, within the meaning of the charter, no cause for recovering a penalty was shown.

But leaving this point undecided, we pass to another which goes to the whole cause of action, and is decisive of the case.

The plankroad of the plaintiff, it appears, was laid along and upon an existing highway, called the *Michigan Road*. That road being a public highway, the defendant had a right to pass over free of toll, unless the company had the legal possession of it.

Section 26 of the charter authorized the company to extend their road "on, along and upon the *Michigan Road*," but section 28 provides that, "before said road shall be run through any county in which the consent of the county commissioners thereof has not been already obtained, said company shall procure the consent of said county board."

The object of this provision undoubtedly was, to make it a condition precedent that the company should obtain the consent of the county commissioners before they appropriated the public highway, lying in any given county. The company so understood it; and hence, on the trial of this cause, sought to show a compliance with the condition. As evidence of such compliance, they introduced an order,

made by two of the county commissioners, the third not being present, at a special meeting held at the auditor's office, *October 1, 1850*, giving the company permission to use the *Michigan Road* in *Decatur* county.

They did not prove that any notice was given by the auditor to the commissioners, in writing, or otherwise, specifying the object for which said special meeting was called.

The act of 1845 (Laws of 1845, p. 54), empowered county auditors to call special sessions, "by giving notice in writing, specifying the purpose for which they were called together, to each of the commissioners," &c.; and provided that, "upon receiving such notice, it shall [should] be the duty of said commissioners to meet at the time appointed therein, and transact the business for which such special session was called."

The board of county commissioners is an inferior Court of special and limited statutory jurisdiction. It must appear, therefore, upon the face of its proceedings, that its action was conformable to the requisitions of the statute governing it. *Barkeloo v. Randall et al.* 4 Blackf. 476.—*White v. Conover*, 5 *id.* 462.—*Rhode v. Davis*, 2 Ind. R. 53.—*Straughan v. Inge*, 5 *id.* 157.

It was necessary, in this case, then, to show that that Court met pursuant to a written notice, to each of the commissioners, stating the particular object of the session; and further, that the order made touching the extension of the plankroad, by the plaintiff below, into the county of *Decatur*, was upon the subject-matter named in such notice; for at the special session, the board would have no jurisdiction over any business not specified in the notice calling it. *Pulaski County v. Lincoln et al.*, 4 Eng. (Ark.) 320.

The consequence is, that the appellee, the plaintiff below, did not show any right to exact toll from the appellant, as a condition of his using the *Michigan Road*.

Another point is made. After the corporation was created, a subsequent legislature changed its name, but without altering its powers. We do not think this fact amount-

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May Term, 1858. *McGREGOR v. AXE.* ed to anything, as between the company and third persons. The identity of the corporate body could be shown. See *The President, &c., of Fort Wayne v. Jackson et al.*, 7 Blackf. 36.

Per Curiam.—The judgment is reversed with costs. Cause remanded for further proceedings in accordance with this opinion, with leave to amend, &c.

J. Gavin and O. B. Hord, for the appellant.



WOMACK v. HENRY.

Wednesday,
June 2.

APPEAL from the *Decatur* Court of Common Pleas.

Per Curiam.—This case is similar, in all respects, to that of *Womack v. Womack*, 9 Ind. R. 288, and for the reason there given, the judgment herein is affirmed with 10 per cent. damages and costs.

J. Gavin and J. R. Coverdill, for the appellant.

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McGREGOR and Wife v. AXE and Wife.

In a suit in chancery, where the code of 1852 was in force at the time of the finding or decree, the failure to move for a new trial is fatal to an appeal to the Supreme Court.

Wednesday,
June 2.

APPEAL from the *Wayne* Circuit Court.

Per Curiam.—This was a bill in chancery by the appellees against the appellants, to set aside a conveyance of certain real estate, on the ground of fraud, and to enjoin an action pending, on the covenants in the deed.

The cause was submitted to the Court for hearing at the *March* term, 1853, but no decision was then pronounced.

At the *August* term of the same year, on leave given, the complainants introduced additional testimony over the objection of defendants, and thereupon the Court pronounced its decree for the complainants.

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No motion was made for a new trial, but several exceptions were taken to the proceedings below.

It is assigned for error, first, that there was no equity to authorize the decree on the pleadings and evidence, as the case stood at the *March* term, 1853, when it was submitted; and secondly, that the Court erred in receiving testimony after the cause was submitted, against the objections of the defendants.

As the Revised Statutes of 1852, by which the distinction between actions at law and suits in equity is abolished, was in force at the time the decree or finding of the Court in this case was pronounced, we think the case must be governed by the code. 2 R. S. p. 223, § 799.

A motion for a new trial was necessary to have been made in the Court below, in order to present any question for the determination of this Court. *Doe v. Herr et al.*, 8 Ind. R. 24.

The judgment is affirmed with costs.

C. H. Test, J. M. Wilson and G. W. Julian, for the appellants.

J. Perry, for the appellees.

JOHNSON v. BELL, Administrator.

Where no exception was noted at the time a decision was made, but the bill of exceptions, filed two days after judgment, states in the present tense, that the party excepts,—*held*, that the exception was taken too late.

Where a bill of exceptions taken and filed after the decision objected to was made, states that the party excepted to the decision at the time it was made, it will be presumed that time was given to reduce the exception to writing, from the fact that the Court afterwards permitted it to be filed; but where neither the bill nor the record shows the exception to have been taken at the time the decision was made, it cannot be presumed that it was so taken, from

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125	608
105	363
140	298

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the fact that the Court permitted the bill of exceptions to be afterwards filed.

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Wednesday,
June 2.

APPEAL from the *Warren* Court of Common Pleas.

Per Curiam.—This was a suit brought by the appellee against the appellant on a promissory note, before a justice of the peace, and appealed to the Common Pleas. In the Common Pleas the cause was submitted to the Court for trial on the 8th day of the *October* term, 1855. On the 9th day of the same term, there was a finding by the Court for the plaintiff below. Motion for a new trial made and overruled; no exception noted; and judgment on the finding for 34 dollars, 71 cents.

Afterwards, on the 11th day of said term, the appellant filed his bill of exceptions, setting out the evidence, and stating that, "to the Court overruling the motion for a new trial and rendering a judgment as aforesaid, the defendant excepts," &c. This language is in the present tense. The term "excepts" has reference to the time of filing his bill of exceptions, and not to the time his motion was overruled, which was two days before. *Leyner v. The State*, 8 Ind. R. 490.

It is provided by statute that "the party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing," &c. 2 R. S. p. 115, § 343.

Where a bill of exceptions, taken and filed after the decision excepted to was made, states that the party excepted to the decision at the time it was made, we would presume that time was given to reduce the exception to writing, from the fact that the Court afterwards permitted it to be filed. But where, as in this case, neither the bill of exceptions nor the record shows that the party excepted at the time, we cannot presume that he did so except, from the fact that the Court permitted the bill of exceptions to be afterwards filed.

We think the exception was not taken in time, and therefore that there is nothing before us.

The judgment is affirmed with costs.

R. A. Chandler, for the appellant.

J. R. M. Bryant, for the appellee.

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1858.

BUTTON
v.
LENT.

THE STATE for the use of OAK GROVE TOWNSHIP v. HOLTON and Another, Auditor and Treasurer of Benton County.

APPEAL from the *Benton* Circuit Court.

Per Curiam.—This was a complaint against *Holton* and *Howard*, the treasurer and auditor of *Benton* county, for an injunction to prohibit said officers from paying over to the treasurer of state the interest arising from the sale of certain congressional school sections, for distribution under the school law of 1852. Demurrer to the complaint sustained.

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June 2.

The sustaining of the demurrer is the only error assigned. But the record presents no exception to the rulings of the Circuit Court; hence the cause is not properly before us.

The appeal is dismissed.

H. W. Chase and *J. A. Wilstach*, for the state.

J. R. M. Bryant, for the appellees.

BUTTON v. LENT.

APPEAL from the *Cass* Court of Common Pleas.

Per Curiam.—Suit commenced before a justice of the peace on an account. A bill of particulars was filed. The defendant filed a bill of particulars as a set-off. Trial. Judgment for the plaintiff. Appeal to the Common Pleas. Trial and judgment for the plaintiff.

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June 2.

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ELLIOTT
v.
MILLS.

tracts, the waiver is good as to the mortgage contract, and the appellant could have prevented a resort to that by paying the note.

The decree is affirmed with 3 per cent. damages and costs.

J. P. Green, for the appellant.

J. L. Wilson and *E. R. Wilson*, for the appellees.

NEWMAN v. FENTERS.

Wednesday,
June 2.

APPEAL from the *Carroll* Court of Common Pleas.

Per Curiam.—In this case, no exception was taken. No question is presented to this Court.

The judgment is affirmed with 1 per cent. damages and costs.

A. H. Evans, for the appellant.

ELLIOTT v. MILLS.

In a suit upon an account which appears upon its face to be barred by the statute of limitations, a credit given by the plaintiff within the period of limitation, does not take the account out of the operation of the statute, without proof that such credit was a payment by the defendant.

But where the defendant, when called upon for payment, examined the account, including such credits, and pronounced it correct,—*held*, that the credits were admitted to be correctly entered as payments; and that the jury might infer from such admission a new promise to pay the residue of the debt.

The affidavits of jurors may be received in support of their verdict; but not to impeach it. Much less will the statement of jurors, not under oath, be received to impeach their verdict.

Wednesday,
June 2.

APPEAL from the *Marion* Court of Common Pleas.

DAVISON, J.—This was an action commenced on the 22d

of *December*, 1855, by *Mills* against *Elliott*, for goods sold and delivered. A bill of particulars filed with the complaint shows various items of account, and also various credits which when deducted leave a balance of 560 dollars in favor of *Mills*.

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1858.

ELLIOTT
v.
MILLS.

The last item on the debit side of the account appears to have been charged *May* 18, 1849. The bill then sets forth two items of credit as follows:

"*March* 16, 1850, by merchandize, - - - \$20 00

"*June* 4, 1851, - - - - - 2 00"

The defendant answered—

1. That on the 9th day of *May*, 1851, he and *Mills* made a full settlement of all accounts then existing between them, in which it was found that defendant was then indebted to *Mills* 380 dollars and no more, and that afterwards on the 10th day of the same month, he fully paid the amount so found due on settlement.

2. That the cause of action did not accrue within six years next before the commencement of the suit, &c.

Replies in denial of the answer.

Verdict in favor of the plaintiff for 355 dollars. And the Court having refused a new trial, rendered judgment, &c.

The evidence is upon the record in the form of depositions. *David A. Lyman* deposed that he was the plaintiff's salesman and bookkeeper; that in the year 1849, he presented to the defendant [the account] and demanded its payment—the charges in the account presented being the same as in that on which this suit is founded, but as to the credits witness could not speak with certainty; that defendant, when the account was presented, did not deny it, but on the contrary, said he would pay it; that since its presentation, witness has had several conversations with defendant respecting the account, and he always said he would pay it as soon as he could; that the last of these conversations occurred in 1851.

Sexton, another witness, testified that in *January*, 1855, he called on the defendant at *Indianapolis*, and showed him the same account on file among the papers in this case;

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that he took the account into his hands, looked over it and said it was all right; but that he failed to pay. *Lyman*, in a second deposition taken at the instance of the defendant, says there is on the plaintiff's books an entry of credit in favor of the defendant for 50 dollars, which purports to have been given on the 17th of *December*, 1849, and is not contained in the plaintiff's bill of particulars.

The above is, in substance, the evidence, so far as it relates to questions arising in the record.

The reversal of the judgment is sought upon two grounds: 1. The action, it is said, is barred by the statute of limitations; and 2. That the verdict is unsustained by the proofs.

We have seen that the last item on the debtor side of the account was charged *May* the 18th, 1849; hence, it must be presumed that the cause of action accrued at that date; and as the present suit was not commenced until the 22d of *December*, 1855, the action is plainly within the statute, unless the credits of *March* the 16th, 1850, and *June* the 4th, 1851, take the case out of its operation. This result would not follow the mere fact that credits were given; because that would allow creditors holding accounts against which the statute had run to manufacture evidence for themselves; but when such credit is given with the privity of the debtor, or he assents to it as a payment on the debt, a new promise to pay the residue may be inferred. 2 R. S. p. 78, § 223.—Angell on Lim. ch. 22, p. 304.—Pars. on Cont. p. 353. It has been decided that a credit given by the plaintiff on an account which would otherwise be barred on its face, without proof that such credit was a payment by the defendant, does not take the debt without the operation of the statute. *Taylor v. McDonald*, 2 Conn. R. 178.—*Watson v. Dale*, 1 Porter (Ala.) 247.

In the case at bar, the proof is that the defendant, when called on for payment, took the account, which included the credits, into his hands, examined it, and said it was all right. This was, in effect, an admission not only that the debit, but also that the credit side of the account was cor-

rectly stated; and from such admission, the jury, in our opinion, had a right to find that the credits of *March* the 16th and *June* the 4th were entered in good faith as payments then made by the defendant, and also to infer a new promise to pay the residue of the debt. At all events, the jury have made the inference from evidence which it was their duty to weigh, and we are not inclined to hold their conclusions erroneous. *Conwell v. Buchanan*, 7 Blackf. 537.

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ELLIOTT
v.
MILLS.

Among the causes assigned for a new trial, there is one especially relied on which reads thus: "The jury unintentionally omitted to allow the defendant a credit of 50 dollars, as proved by the deposition of *David A. Lyman*." To sustain this assignment, the defendant proposed to introduce upon the hearing of the motion the following statement:

"*Joseph H. Mills v. Wm. J. Elliott*. We the undersigned, two of the jurors who tried the above cause, state that we unintentionally overlooked and failed to give the defendant the credit of 50 dollars paid by him on the 17th of *December*, 1849, as shown by the deposition of *David A. Lyman*, wherefore we say that the verdict is for 50 dollars too much. [Signed,] *William H. Lingenfelter, Thomas Morrison*."

The Court refused the introduction of this statement, and the defendant excepted.

The rule is that the affidavits of jurors may be received in support of their verdict; but not to impeach it. 2 Blackf. 114 (1). Here, the jurors, in effect, say that in consequence of their negligence the verdict is erroneous. This is evidently an impeachment of the verdict. But the statement was not even verified by oath, and was for that reason inadmissible. And the rule to which we have referred at once shows that there was no error in the refusal to admit the statement.

In view of all the evidence, we are not inclined to say that a new trial should have been granted.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

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WILKINSON

v.
THE STATE.

W. Henderson, for the appellant.

N. B. Taylor and *J. Coburn*, for the appellee.

(1) See, also, *Conner v. Winton*, 8 Ind. R. 315.

WILKINSON v. THE STATE.

The word *said*, in an indictment, will be referred to the next antecedent only when the plain meaning requires it.

An indictment for passing a forged and counterfeit bank note with intent to defraud, need not aver that the person to whom the note was passed did not know that it was counterfeit.

Quære, whether the intent to defraud must exist towards the person to whom the counterfeit money is passed, or whether it may not exist towards third persons.

It seems, that an indictment in the words of the statute, alleging the passage of the counterfeit with intent to defraud generally, would be good; but that where the intent to defraud a particular person is averred, it must be proved.

Thursday,
June 8.

APPEAL from the *Porter* Circuit Court.

PERKINS, J.—Indictment for forgery. Motion to quash overruled. Trial, conviction, and sentence to the penitentiary. A motion in arrest of judgment was denied.

The evidence is not upon the record.

But two questions are presented, and they arise upon the indictment.

The indictment reads as follows:

"The grand jurors of the state of *Indiana*, good and lawful men of *Porter* county, impanneled, charged and sworn in the said Circuit Court at the term thereof aforesaid, to inquire within and for the body of said county, upon their oaths present, that *Frank Wilkinson*, late of said county, on the twentieth day of *March*, A. D. 1857, at *Porter* county, did unlawfully, falsely, fraudulently and feloniously, give, barter, sell, utter, publish, and put away to one *Joseph Jones*, a certain false, forged and counterfeit bank note, which said note was made in imitation of, and did

then and there purport to be a bank note for the sum of five dollars, issued by the *Farmers' Bank of Kentucky*, made payable to bearer on demand at their bank in *Princeton*, which said note is of the tenor following, to-wit:

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5. 717.	717. 5.
C.	C.
The <i>Farmers' Bank of Kentucky</i> will pay Five Dollars, at their bank in <i>Princeton</i> , to the bearer on demand.	
5. Frankfort, Oct. 1, 1856.	5.
J. B. Semple, Cash.	John H. Hanna, Pres't.
Toppan, Carpenter, Casilear & Co., Phila. & New York.	

“With intent to defraud the said *Joseph Jones*, and with intent to have the same put in circulation; the said *Frank Wilkinson* then and there well knowing the said note to be false, forged and counterfeit: against the peace and dignity of the state of *Indiana*, and contrary to the form of the statute in such cases made and provided.

“*Mark L. De Motte*, Pros. Att’y.”

Two objections are taken to this indictment—

- 1. That it is uncertain.
- 2. That it does not charge an indictable offense.

The uncertainty is alleged to arise from the use of the word *said*, in the sentence immediately preceding the copy of the note given in the indictment. It is claimed that that word refers to the note last before mentioned; that that is the genuine note; and, hence, that the indictment charges the passing of a genuine, not a forged note.

Our statute enacts that “the words ‘preceding’ and ‘following,’ referring to sections in statutes, shall be understood as meaning the sections next preceding, or next following that in which such words occur, unless some other section is designated.” 2 R. S. p. 339. It lays down no rule, so far as we have noticed, in relation to the use of the word *said*. We determine its reference, in any given case, by the sense. In the interpretation of a written instrument, *Kent* says that “the relative *same* refers to the next antecedent, though the word *said* does only when the plain meaning requires it.” 2 Com. p. 555.

Applying this rule to the indictment before us, we have

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no difficulty in deciding that it refers to the counterfeit note.

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THE STATE.

The objection to the sufficiency of the indictment in charging the offense is, that it does not aver that *Jones*, to whom the bill was passed, did not know that it was a counterfeit. But the objection is groundless. It was not necessary that the indictment should negative such knowledge.

The indictment was framed upon section 32, 2 R. S. p. 416. It contains the language of that section, and a part of that of the succeeding section, which creates a separate offense. But the language incorporated from the latter section is surplusage and does not vitiate the indictment. See *Dillon v. The State*, 9 Ind. R. 408.

The essence of the crime created by the 32d section is the intent to defraud by passing the counterfeit money.

The essence of the crime created by the 33d section is, the intent to have the counterfeit money disposed of—put in circulation.

Under this latter section, it is very clear that the want of knowledge of the character of the money on the part of the receiver, need be neither averred nor proved. Indeed, where a person (the manufacturer, for example,) was seeking to get counterfeit money put in circulation, he would be likely to select, as agents for the purpose, those who knew its character, and were skilled in such business.

Nor need the want of such knowledge necessarily be averred or proved in a prosecution under the 32d section; because the person passing the counterfeit money may not know that the receiver is aware that it is counterfeit, and hence may intend to defraud him, though such knowledge does exist; while the receiver, with such knowledge, may deem it advisable to take the money for the purpose of being able to prosecute and bring to justice the offender.

There may be another reason—though we decide nothing here upon this point. It is not clear that the intent to defraud must exist in reference to the person to whom the counterfeit money is passed. It may, perhaps, exist to-

wards third persons. A counterfeit bill may be disposed of to one man for the purpose of a fraud to be perpetrated upon another. The statute does not specify against whom the intent to defraud must exist; and perhaps an indictment, in the words of the statute, alleging the passage of the money with intent generally to defraud, would be good. It should be observed, however, that where the prosecutor does aver the intent to be to defraud a particular person, he will probably be held to proof of the averment.

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SHERRY
v.
PICKEN.

Per Curiam.—The judgment is affirmed with costs.

J. B. Niles, for the appellant.

M. L. De Motte, for the state (1).

(1) Touching the word *said*, Mr. *De Motte* cited 1 Chit. Pl. pp. 238, 239; 2 Kent's Com. p. 719. Upon the second point in the case, he cited Whart. Prec. pp. 164, 165; 2 R. S. pp. 367, 368.

SHERRY and Others v. PICKEN.

Emblements are personal property, and may be sold by parol contract, earnest being paid where the price reaches an amount within the statute of frauds.

Where the sale is complete, the title passes without delivery of the property. But where delivery and payment are to be concurrent acts, the purchaser cannot claim possession till he has paid the price; and in such case, the seller has a lien for unpaid purchase-money.

Where delivery is to precede the payment of the money, possession may be claimed before payment, unless the purchaser be discovered to be insolvent; and if possession be voluntarily delivered without the payment of the purchase-money, the lien is waived, unless secured by mortgage.

A receipt is not usually a contract, though it may be so drawn as to constitute one. A receipt not purporting to contain a contract, but merely acknowledging a contract to have been made and a sum paid thereon, is not itself a contract, nor does it preclude parol proof of the contract referred to.

If *A.* purchase personal property of *B.*, who afterwards sells it to *C.*—the latter purchasing and holding the same in good faith—*A.* cannot maintain a suit for the property against *B.* and *C.* without first making a demand.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Thursday, June 3.*
PERKINS, J.—Suit by *Picken* against *Sherry* and others,

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PICKEN.

for a quantity of corn, alleged to have been the property of the former and wrongfully converted by the latter to their own use.

Answer, denying property in the plaintiff, and alleging property in the defendants. Issue by reply.

Trial by jury; judgment for the plaintiff.

Picken claimed title to the corn by virtue of a purchase from *Sherry*. *Sherry*, and the other defendants who claimed through him, denied that *Picken* so far complied with his contract of purchase as to vest the title to the corn in him. And this was the question in the cause.

Sherry raised the corn, and *Picken* averred that he purchased it of him while it was yet standing in the field, and paid a part of the purchase-money. *Sherry* denied that *Picken* complied with his contract of purchase, [averred] that the title to the corn never vested in him, and that he, *Sherry*, as he lawfully might, subsequently resold it to his co-defendants.

The jury found—

1. "That on the 4th day of *September*, 1854, the defendant, *Sherry*, sold and delivered eighty-seven acres of corn, standing in the field, to the plaintiff, and that said corn thereby became the property of the plaintiff."

2. They found that the defendant, *Sherry*, subsequently made a pretended sale, &c., to the other defendants, and that their possession of the corn was wrongful, &c.

3. They found the value, &c.

Growing crops, raised annually by labor, are personal property, and may be sold by parol contract, earnest being paid where the price equals the amount for which the statute of frauds requires earnest. *Weatherly v. Higgins*, Ind. R. 73.—*Bricker v. Hughes*, 4 *id.* 146. Where the sale is complete, the title passes without the delivery of the property. *Indiana Digest*, tit. Sale, p. 724. But possession cannot be claimed by the purchaser till payment of the price, where payment and delivery are to be concurrent acts. The seller, in such case, has a lien for the unpaid purchase-money. But if the delivery is to precede, for a certain time, the payment of the money, then possession

may be claimed without such payment, unless the purchaser be discovered to be insolvent. And if, in any case, possession be voluntarily delivered without the payment of the purchase-money, the lien for the latter is waived, unless secured by mortgage. See Bouv. L. Dic., tit. Stoppage in Transitu.

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In this case a receipt, as follows, was given in evidence:

"September 4th, 1854. This is to certify that I have sold to *Hunter Picken* one lot of 87 acres of corn, and have received on the same 325 dollars. *Jacob Sherry*."

The Court instructed the jury that this written instrument merged all contracts relative to the corn, and that parol evidence of a contract of sale could not be given.

A receipt is not usually a contract. It may be so drawn as to constitute one, but the above is not. It does not purport to contain the contract. It merely acknowledges that one has been made, and the amount of money named paid on it. It did not preclude proof of the terms of that contract. *Pribble v. Kent et al.*, at this term (1).

The Court instructed the jury that this suit could be maintained against the defendants without a demand having been first made of the corn.

This instruction was wrong. The evidence shows that all of the defendants except *Sherry* were *bona fide* holders of the corn, through a purchase from *Sherry*. The law is well settled that in such case a suit cannot be maintained against such holders, at least till after demand. Till that has been made, and not complied with, they are not, at all events, wrongdoers. *Wood v. Cohen et al.*, 6 Ind. R. 455.

as to the measure of damages, see *Pribble v. Kent*, *supra*.

Higgins, where the sale of the property of the plaintiff was taken possession of by the defendant of the concurrent possession of the unpaid proceeds, for a possession.

Curiam. — The judgment is reversed with costs. The case be remanded for a new trial.

A. Huff, Z. Baird, J. F. La Rue and W. F. Lane, for the appellants (2).

C. Gregory, H. W. Chase and J. A. Wilstach, for the appellee (3).

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(1) *Ante*, 325.

(2) Upon the points stated in the first four paragraphs of the syllabus, counsel for the appellants cited *Wilmshurst v. Bowker*, 40 E. C. L. 629; *Bradley v. Michael*, 1 Ind. R. 551; *Bloxam v. Saunders*, 4 B. & C. 941; Chit. Cont. p. 442; *Parker v. Rawlins*, 4 Bing. 280; Story on Cont. §§ 803, 804; *Heaton v. Colgrove*, 3 Ind. R. 265. Touching the measure of damages—Chit. Cont. p. 445, note 2, where numerous authorities are cited.

(3) Upon the points stated in the first four paragraphs of the syllabus, counsel for the appellee cited 1 Pars. Cont. 436, 442, 443; *Smith v. Dennis*, 6 Pick. 262; Chit. Cont. 269, 270, 341, 347, 348. Upon the point stated in the fifth paragraph—Chit. Cont. 332; 1 Pars. Cont. 436. Touching the measure of damages—Sedgw. Dam. 507, and numerous cases there cited.

PERRY v. ENSLEY and Wife.

Thursday,
June 3.

APPEAL from the *Bartholomew* Circuit Court.

Per Curiam.—Motion to vacate the judgment in a suit to set aside a deed as fraudulent. Motion denied.

The judgment in the case is affirmed with costs, for reasons given in *Benner v. Benner* (1) and *Robinson v. Bergan* (2), at this term.

W. Herod and *S. Stansifer*, for the appellant.

(1) *Ante*, 256.

(2) *Post*.

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Thursday,
June 3.

APPEAL from the *Decatur* Circuit Court.

Per Curiam.—Suit upon the judgment of a justice of the peace.

Answer, the statute of limitations, of six years.

Demurrer to the answer overruled. Judgment for the defendant.

The appellant relies on the cases of *Reddington v. Julian et al.*, 2 Ind. R. 224, and *Barker v. Adams*, 4 *id.* 574. May Term,
1858.

The cases are not applicable. They were suits upon judgments in Courts of record, other than those of justices of the peace, and were governed by a different section of the statute, viz., § 121, p. 689, R. S. 1843. See *Stipp v. Brown*, 2 Ind. R. 647. THE STATE
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The case at bar is governed by § 101, p. 686, of the same statutes; and by that section, suits on justices' judgments must be brought within six years.

The judgment is affirmed with costs.

J. S. Scobey and *A. Brower*, for the appellant.

J. Gavin and *O. B. Hord*, for the appellee.

LOUDERMILK v. DRIVER.

ERROR to the *Sullivan* Circuit Court.

Per Curiam.—The judgment in this case must be reversed. The record shows no cause of action.

The judgment is reversed with costs. Cause remanded, &c.

J. P. Usher, for the plaintiff.

S. B. Gookins, for the defendant.

THE STATE on the relation of BLAIR v. ROBESON and Another.

APPEAL from the *Franklin* Court of Common Pleas. Thursday,
June 3.

Per Curiam.—Suit upon the official bond of a justice of the peace, against him and his sureties. The breach assigned was the failure to pay over money collected.

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HUNTER.

The defense set up in the answer was, that the justice collected the money named in the complaint "as the agent of the said *James Blair*, relator in the suit, and not by color of his office as justice," &c. Issue upon this defense. Trial by the Court, and judgment for the defendants.

The case turns entirely upon the evidence. See *The State v. Carter*, 6 Ind. R. 37.

In such cases, if the evidence tends in any degree to support the judgment, the Supreme Court rarely interferes. We see nothing that will justify such interference in this case.

The judgment is affirmed with costs.

J. D. Howland, for the state.

H. Berry and *G. Holland*, for the appellees.

TROUT v. SMALL and Another.

Thursday,
June 3.

APPEAL from the *Boone* Court of Common Pleas.

Per Curiam.—The record in this case presents no question to this Court.

The judgment is affirmed, with 5 per cent. damages and costs.

O. S. Hamilton, for the appellant.

TEMPLETON and Another v. HUNTER.

Appearance and answer waive proof of publication.

Where the refusal to suppress a deposition is assigned for error, the bill of exceptions must specify whose deposition it was; for if it was one not read in evidence, no harm was done by the refusal, though it might be erroneous.

APPEAL from the *Warren* Court of Common Pleas.

May Term,
1858.

Per Curiam.—Suit commenced by attachment; complaint, affidavit, &c., properly filed; appearance and answer by the defendant in the attachment, and by a person summoned as garnishee; trial and judgment for the plaintiff.

THE PRESIDENT, &C., OF
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CONWELL.

Motion for a new trial overruled.

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June 3.

It is objected that the record does not show proof of publication. But the appearance and answer waived that.

It is contended that the Court erred in refusing to suppress a deposition; but the bill of exceptions does not specify whose deposition it was, and the Court cannot know that it was one that was read in evidence. If it was not, no harm was done, even if the Court erred in refusing to suppress, which we do not decide.

We cannot say on the evidence that the Court erred in its ruling as to a new trial.

The clerk states that certain motions were made, overruled, &c., and excepted to; but the clerk is not authorized in such cases to speak for the Court. There should be a bill of exceptions signed by the judge.

The judgment is affirmed with 1 per cent. damages and costs.

THE PRESIDENT AND TRUSTEES OF CONNERSVILLE v. CONWELL.

Where a motion to strike out a pleading raised a question of fact, and the record did not show what the fact was, the Supreme Court presumed that the motion was correctly overruled.

APPEAL from the *Fayette* Circuit Court.

Wednesday,
June 16.

HANNA, J.—This was a suit to compel the payment of a tax levied by the corporate authorities of the town of *Connorsville*.

Upon the filing of the answer, the plaintiffs moved the

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v.
JELLY.

Court, and filed the reasons in writing, to strike out one paragraph of the answer which alleged the tender of 22 dollars and 75 cents—the proportion of said tax which the real estate bore to the whole assessment—on the ground that the money was not paid into Court. The answer alleges that the money was brought into Court when the answer was filed; the written motion alleges that it was not.

There is nothing properly on the record to base the motion upon. The pleading and written motion make a question of fact. The motion was correctly overruled, we will presume, in the absence of anything to show how such fact was.

It is assigned as an error, that the Court overruled the demurrer to the fourth paragraph of the answer. We cannot examine that question, for the reason that the ruling of the Court was not excepted to.

There is no other point raised, in a shape that we can pass upon.

Per Curiam.—The judgment is affirmed with costs.

S. W. Parker, J. McIntosh and J. Perry, for the appellants.

J. A. Fay and N. Trusler, for the appellee.

HELPER v. JELLY.

Suit upon a promissory note, commenced before a justice of the peace. There was no answer. From the evidence it appeared that the defense was, a failure of consideration. There was no testimony as to what the note was given for; but the bill of exceptions stated that it was alleged by the defendant, and not denied by the plaintiff, that the cause had been tried before the justice upon its merits—no one pretending that the note was given for any other consideration than a certain buggy, or that the parties had ever had any other dealings. The evidence was directed to the value, &c., of the buggy, which was in the possession of the defendant. In the absence of pleadings and evidence upon the point—*held*, that the statement sufficiently showed that the note was given for the buggy.

Held, also, that the action having originated before a justice of the peace, evidence of a failure of consideration was admissible without plea.

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1858.

APPEAL from the *Ohio* Court of Common Pleas.

HELPER

v.

JELLY.

HANNA, J.—This was a suit commenced before a justice of the peace on a promissory note. Judgment for the defendant. Appeal to the Common Pleas Court; trial by the Court, and judgment for the defendant.

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June 16.

There was no answer filed. From the evidence admitted and placed upon record by a bill of exceptions, the defense attempted to be made thereby appears to have been a failure of consideration.

There is an entire absence of testimony as to what the note sued on was given for; but the following statement is inserted in the bill of exceptions:

“It was alleged by the defendant, and not denied by the plaintiff, that the cause had been tried before the justice of the peace on its merits—no one pretending that the note in question was given for any other consideration than the buggy, or that the parties had ever had any other dealings together.”

The evidence was directed to the value and deficiencies of a certain buggy in the possession of the defendant. In the absence of pleadings and evidence upon the point, does the above quoted statement, contained in the bill of exceptions, sufficiently show that the note was given for the buggy about which proof was offered? We think it does. There are many concessions made, and matters taken as conceded, during the progress of trials, which in terms have not been conceded or admitted, that it is difficult from any thing that may be placed upon paper, to fully understand and appreciate.

Objection is made to the sufficiency of the evidence to sustain the finding of the Court; but as the testimony tends to sustain the defense to which it was directed, we will not disturb such finding if the testimony was, under the pleadings, properly admitted.

There was no affirmative answer. The testimony as to the failure of consideration of the note was for that reason objected to. This action having originated before a justice

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THE STATE.

of the peace is governed by the practice in that Court, where all matter of defense, except the statute of limitations, set-off and matter in abatement, may be given in evidence without plea. 2 R. S. p. 455. This was not a set-off, as contended by the appellant, but a matter going to the essence of the cause of action or contract, in the form of a total failure of consideration.

Per Curiam.—The judgment is affirmed with costs.

T. Gazlay, for the appellant.



VANLIEW v. THE STATE on the relation of ACKERMAN.

In this case the clerk's certificate states that the transcript contains so much of the proceedings in the Court below, as the defendant's attorney directed him to give. *Held*, that an appeal will not be entertained upon a transcript thus certified, except in a case authorized by statute.

Wednesday,
June 16.

APPEAL from the *Clark* Court of Common Pleas.

PERKINS, J.—Complaint for surety of the peace.

The complaint was made before a justice of the peace, and sustained. A transcript was filed in the Common Pleas. Jury trial there; finding that there was cause to fear, &c.; and judgment that security be given, &c. Appeal to the Supreme Court.

A motion for a new trial was made in the Common Pleas, on the ground that no affidavit had been filed against the defendant before the justice; but the motion was overruled.

The motion was not a proper one to reach the defect. The motion should have been to dismiss, or in arrest of judgment.

But the objection is valid upon appeal, and had we a complete transcript before us, in which no affidavit, filed pursuant to the statute in such case made and provided, (2 R. S. p. 500,) appeared, we should be compelled to reverse the case; because the record would show no ground

of complaint, no cause of action, to give a Court jurisdiction to act—in short, to sustain the judgment.

But we have not evidence that such a transcript is before us. The certificate of the clerk is, that it is a transcript of so much of the proceedings as the defendant's attorney directed him to give. An appeal will not be entertained upon a transcript thus certified, except in a case authorized by statute, and that in this case must be dismissed.

This is not an appeal in case of a reserved question, provided for in § 155, 2 R. S. p. 381, nor is it governed by § 558, p. 159, of the same volume, as it is not a civil case. 4 Blackstone, 251, 252.

Per Curiam.—The appeal is dismissed with costs.

— *Buchanan* and — *Daily*, for the appellant.

C. A. Ray, for the state.

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ALVORD
v.
GERE.

ALVORD and Others v. GERE.

Motion to set aside a judgment by default, and for leave to plead. Two days after judgment, affidavits were filed to the effect that the defendant had before the commencement of the suit, settled with the plaintiff, and paid the damages sued for; that the defendant had employed an agent to employ counsel and defend the suit, who had failed, owing to a misunderstanding as to the Court and term, to attend to it; that defendant was compelled to be absent from the state till after the commencement of the term of the Court; that as soon as the facts were known, counsel were employed, who made application to defend, &c. *Held*, that the defendant was entitled to have the default set aside, with leave to plead, &c.

APPEAL from the *Fountain* Circuit Court.

PERKINS, J.—*Gere* brought suit against *Alvord*, *Sullivan*, *Claypool* and *Davison*, to recover damages alleged to have been sustained by him through the upsetting of a stage-coach to the amount of 2,000 dollars. Process was served on *Alvord*, and returned not found as to the other defendants. *Alvord* was defaulted, and judgment rendered against him for 2,000 dollars, on the 5th day of the term,

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June 16.

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JORDAN
v.
MOORE.

and the suit was dismissed as to the defendants not served.

Two days afterwards, being the 7th day of the term, *Alvord* appeared and moved that the judgment be set aside, and leave given him to plead. The motion was founded upon the affidavits of *Owen Tuller*, *Reuben Tuller*, and *William H. Mallory*.

The affidavits establish the following facts: That the stage company, the defendants included in the writ, had, before the commencement of the term of Court, fully settled with and paid the plaintiff for the damages sustained and sued for; that *Alvord*, the defendant served, immediately after being notified of the suit, employed *Owen Tuller* as his agent to attend to it, employ counsel, &c.; that *Alvord* resided at *Indianapolis*, but was compelled by business to be absent from the state till after the commencement of the term of Court; that *Tuller* wrote to a brother of his to employ counsel, &c., and supposed it had been done, but, from a misunderstanding as to the Court and term, it turned out that it had not been; and that as soon as these facts were known, counsel were employed, who made the application to defend, &c.

These are the principal facts. We think they made a case that entitled the defendant to have the default set aside, leave given to plead, and a trial.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. P. Usher and *W. H. Mallory*, for the appellant. (1).

(1) Counsel cited 2 Whitaker's Practice, p. 78, and cases cited; *The People v. The Superior Court of New York*, 10 Wend. 285 to 297; 2 R. S. p. 48, § 99.

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June 16.

APPEAL from the *Hendricks* Circuit Court.

Per Curiam.—Suit to recover the value of a horse, &c.

The complaint contains two paragraphs—one alleging that the parties swapped horses on *Sunday*, the other alleging a swap and fraud therein. The complaint alleges a tender back of the animal received by the plaintiff.

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JOHNSON
v.
JOHNSON.

The cause was tried by the Court. Judgment for the plaintiff. The evidence is not upon the record.

There is no question before this Court. We do not know upon which paragraph of the complaint the Court found.

It is probable that the Court would leave parties who had exchanged horses on *Sunday* where it found them—both being equally wrong.

The judgment is affirmed, with 10 per cent. damages and costs.

J. M. Gregg and *H. C. Newcomb*, for the appellant.

C. C. Nave, for the appellee.

JOHNSON v. JOHNSON.

The fact that a man believes his wife to be bewitched, does not show him to be incompetent to make a contract.

The fact that the consideration of a contract is not, in the judgment of third parties, adequate, does not render the contract void.

These are circumstances to be considered by the jury.

APPEAL from the *Dearborn* Circuit Court.

Wednesday,
June 16.

Per Curiam.—Suit to recover possession of real estate. Answer, that the defendant was in possession under a contract of purchase from the plaintiff; that he had fulfilled his contract and was entitled to a deed which he claimed. Reply, that the contract was invalid because of want of soundness of mind in the plaintiff when he executed it.

Trial by jury, finding for the defendant, motion for a new trial overruled and judgment on the verdict, and that a deed be executed to him for the land by the plaintiff, pursuant to the contract.

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v.
BOYD.

The case was fairly put to the jury by the instructions of the Court, and the judgment must be affirmed with costs.

The fact that the plaintiff believed his wife to be bewitched did not show him incompetent to make contracts. *Addington et al. v. Wilson et al.*, 5 Ind. R. 137.

The fact that the consideration might not, in the judgment of others, be adequate, did not render the contract void. *Brown et al. v. Budd*, 2 Ind. R. 442.

These were circumstances for the jury, and they considered them in connection with the other evidence in the cause.

The judgment is affirmed with costs.

J. Ryman, for the appellant. (1)

W. S. Holman, for the appellee.

(1) Mr. Ryman cited *Ash et al. v. Daggy*, 6 Ind. R. 259; *Hackleman v. Moot*, 4 Blackf. 164.

ORME v. BOYD, Administrator.

Wednesday,
June 16.

APPEAL from the *Marion* Court of Common Pleas:

Per Curiam.—This was a claim, by the wife, of certain property inventoried among the personal estate of her deceased husband, by the administrator.

It is agreed that the property belonged to the wife before marriage, and was by her brought to the house of the husband and used, &c.

The Court decided that the property was subject to be administered as a part of the estate of the husband.

The only point made by counsel in this Court is, upon the constitutionality of the fifth section of chap. 28 of the Laws of 1853, p. 55.

That question is decided in the case of *Wilkins v. Miller*. 9 Ind. R. 100.

The judgment is reversed with costs.

N. B. Taylor and *J. Coburn*, for the appellant.

A. G. Porter, for the appellee.

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1858.

MILTON, &c.,
TURNPIKE
COMPANY.
v.
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MILTON AND WATERLOO TURNPIKE COMPANY v. HALL
and Another.

Complaint upon a draft drawn by a contractor upon a turnpike company. The draft, which was a part of the complaint, showed that the sum for which it was drawn was not to be paid until after the last estimate on a certain section of the work, &c. The complaint admitted that the work on that section was abandoned, but sets up, as an excuse for such abandonment, that the amount estimated for work done before the abandonment had not been paid. But it was not alleged that by the terms of the contract, or otherwise, that amount was due before the abandonment. *Held*, that the complaint was bad.

APPEAL from the *Union* Circuit Court.

Thursday,
June 17.

HANNA, J.—*Wade*, a contractor in the construction of a portion of the road of the said company, drew three orders upon the said company, in favor of three several persons, which orders were accepted by *William Port*, the president of said corporation, one of which was as follows:

“*Brownsville, May 14, 1849.* The president of the *Milton and Waterloo Turnpike* board will please pay *Edward Hall* 76 dollars and 94 cents, out of the last estimate on section six (6) on the above pike, or so soon after said section shall be finished as collections can be made from stockholders.”

The first paragraph of the complaint is founded upon this order, and each of the other paragraphs upon an order. The plaintiffs held all the orders as assignees.

There was a demurrer to the first paragraph of the complaint, and the cause assigned was, that it does not state facts sufficient to constitute a cause of action.

That portion of the complaint which attempts to show that the sum mentioned in said order was due and payable,

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COMPANY.
v.
HALL.

is as follows: "And the plaintiffs further aver that said defendants failed to make said collections from said stockholders, although the same was due and payable, and refused to pay said *Wade*, or his subcontractor, *Michael Snyder*, the amount of estimate allowed by their engineer for work and labor done on said section 6 by said *Wade*, by which said work on said section was abandoned, and the said defendants refuse to pay said draft, or any part thereof, although the same is long since due and payable, and has been often demanded."

The order or draft, a copy of which is a part of the complaint, shows that the sum for which it was drawn was not to be paid until after the last estimate on section 6 of said road, or after it was finished, &c.

The complaint admits that the work on that section was abandoned, and attempts to set up as an excuse for such abandonment, that the amount of estimate allowed for work done before such abandonment had not been paid by the company. It alleges the making of the estimate, but wholly fails to allege that by the terms of the contract, or otherwise, the amount so allowed was due from the company before the contract was abandoned. Certainly if the estimate made was not due before such abandonment, the company was not in default for not paying it, and the non-payment would not, therefore, be an excuse for failing to complete the work.

The motion for a new trial brought up the question of the sufficiency of the evidence to sustain the finding, which was for the plaintiffs.

There was a general denial filed to the complaint. We do not propose to notice the evidence at length. There was an absence of proof upon the point in which the complaint was defective, and, therefore, even if that pleading had been good, the plaintiff would have failed to make a case.

Per Curiam.—The judgment is reversed with costs.

N. Trusler and *J. F. Gardner* for the appellants.

J. S. Reid and *S. Heron*, for the appellees.

LEMASTERS and Others v. THE STATE.

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185 130LEMASTERS
v.
THE STATE.

Prosecution for malicious trespass against five persons. All the defendants being on trial, one of them was offered as a witness in behalf of the others. His testimony being objected to, was excluded. *Held*, that this was not error.

Aliter, if the defendants had taken their trial separately.

Where a road was, by order of the proper authority located on a line between two farms—so far as such order could make a location—but was in point of fact, opened, worked and used for twenty-seven years on one side of that line, wholly on the land of one of the proprietors,—*held*, in a prosecution for malicious trespass, that the original order would not, at that length of time after it was made, confer upon the supervisor the authority, under our statutes, to open the road upon the line.

APPEAL from the *Decatur* Court of Common Pleas. *Thursday, June 17.*

HANNA, J.,—This was a prosecution for malicious trespass against five persons, plea not guilty. Trial, verdict, judgment of guilty, &c.

It is alleged that two errors were committed by the Court on the trial; first, in refusing to admit evidence; and secondly, in giving and refusing instructions to the jury.

All the defendants being on trial, *John Lemasters*, one of said defendants, was offered as a witness in behalf of his co-defendants. His testimony being objected to, was excluded. There was no error in this. The defendants were entitled to separate trials, if the same had been asked for at the proper time. In such case, the testimony of a co-defendant not upon trial, might have been used by one on trial. 6 Ind. R. 495.—2 R. S. p. 372 (1). But having, voluntarily, jointly submitted their case to a jury, they could not then be witnesses for each other, unless discharged for that purpose by the Court, under § 106, 2 R. S. p. 375.

Certain instructions were asked by the defendants, and refused by the Court. These instructions assumed that it is the duty of a supervisor of a public highway to remove a fence which may encroach upon such highway; that notice under the statute to a land owner to remove his fence could be required only in cases of newly located roads, and not when the road had been located over twenty years;

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that if one of the defendants was acting as supervisor, and the others under him, the presumption would be that they acted in good faith, and express proof of malice or mischievous motive should be made.

The instructions given were, that malice might be proven expressly, by showing ill will, or by the circumstances and conduct of the parties at the time; that a supervisor had no right to enter upon the enclosed land of another to open a highway, without giving the owner or occupant sixty days' notice in writing, &c.; that a public highway laid out, &c., which shall not within six years therefrom be opened and used, shall cease to be a highway; that an order made in 1830 for the location of a road on the line between the lands of the prosecuting witness and the defendant, who is supervisor, which was immediately followed by opening the road on the land of the defendant, and which has been used and worked where opened until the act complained of (1857); will not authorize such supervisor to throw down the fences which may have prevented said road from running on said line.

This is the substance of the instructions, given and refused, upon the points made in the briefs of counsel.

We see no error in the rulings of the Court upon those instructions. The evidence is not in the record, and therefore the presumption is that it tended to establish a state of facts which made the instructions given pertinent.

Certainly, if a road was, by order of the proper authority, located on a line between two farms—so far as such order could make a location—but, in point of fact, was opened, worked and used for twenty-seven years, on the one side of that line, wholly on the land of one of the persons, the original order would not, at that length of time after it was made, confer upon a supervisor the authority, under our statutes, to open the road upon the line between the farms. From the whole of the instructions, which are unnecessarily long, this appears to have been the point in controversy.

Per Curiam.—The judgment is affirmed with costs.

J. S. Scobey and W. Cumback, for the appellants.

J. Gavin and O. B. Hord, for the state.

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1858.

HARVEY
v.
FERGUSON.

(1) See, also, *Sloan v. The State*, 9 Ind. R. 565.

HARVEY v. FERGUSON.

In a suit in the Common Pleas, the plaintiff laid his damages, in the conclusion of his declaration, at 1,000 dollars. The Court permitted him to amend by reducing his claim to 999 dollars. *Held*, that the amendment was proper.

Where all the evidence is not in the record, this Court cannot judge of the correctness of the ruling of the Court below in the denial of a new trial, or upon any other point arising upon the evidence.

APPEAL from the *Hamilton* Court of Common Pleas. *Thursday, June 17.*

PERKINS, J.—Suit upon a promissory note, and for work and labor, goods sold, &c.

The defendant answered, denying that he was indebted to the plaintiff, alleging that plaintiff and defendant had been partners, and that the note was given for an interest in the partnership, but that, by a subsequent agreement, it was to be given up and canceled; and in another paragraph, he set up and claimed a set-off.

Issues by replies. Trial by jury; finding and judgment for the plaintiff.

By a bill of exceptions it appears that the plaintiff had laid the damages in the conclusion of his declaration at 1,000 dollars, and that the Court permitted him to amend by reducing the amount to 999 dollars. This Court, in *Epperly v. Little*, 6 Ind. R. 344, held such an amendment proper.

Should the Court dismiss, in such a case, for want of jurisdiction, the plaintiff could immediately reduce his claim to damages, refile his declaration, and thus institute his suit anew. It comes nearly to the same thing, except as to time, as permitting him to amend on payment of all

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costs to the time of amendment. This he would be required to do, if the defendant insisted upon it. Under our very liberal statutes as to amendments, the Court has sustained this course of practice, as tending to promote the ends of justice without materially infringing any legal principle.

By another bill of exceptions it appears that a motion was made for a new trial and overruled. The bill does not purport to set out all the evidence, nor does any other part of the record. The merits of the case upon the evidence, are not, therefore, before us. We cannot judge of the correctness of the ruling in the denial of a new trial.

A third bill of exceptions shows that the defendant asked leave to amend his plea of set-off that it might meet a state of facts which he assumed was presented by the evidence. The Court refused to grant the leave on the ground that the evidence did not present the state of facts assumed by the defendant.

As the record does not purport to contain all the evidence, we cannot say that the Court erred in its view of what it established.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

D. C. Chipman, J. W. Evans, W. Garver and M. B. Hopkins, for the appellant.

G. H. Voss, for the appellee.

LEWIS and Another v. MORRISON.

In a suit upon an account before a justice of the peace, the defendant made a written offer to confess judgment, which the plaintiff accepted, and judgment was rendered accordingly. On appeal to the Circuit Court, the written offer was transmitted with the other papers. On the calling of the case, the plaintiff moved that the appeal be dismissed; whereupon the defendant, upon affidavit that he had verbally withdrawn the written offer before the justice, moved for a *certiorari*, which motion the Court overruled, and dismissed the appeal. *Held*, that there was no error.

APPEAL from the *Huntington* Circuit Court.

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1858.

PERKINS, J.—Suit upon an account for 20 dollars, commenced before a justice of the peace.

LEWIS

v.

MORRISON.

At the hour set for trial the parties appeared, and, says the transcript, the plaintiff produced a written notice from the defendants as follows:

Thursday,
June 17.

“*John Morrison* } Suit pending before *Louis Hitzfield*,
v. } justice of the peace of *Huntington* town-
John Lewis et al. } ship.

“The plaintiff in the case will please take notice that the defendants offer to allow judgment to be taken against them in the above action, for the sum of fourteen dollars and the costs which have accrued up to this time, in full satisfaction of the claim sued upon.

“30th May, 1855.

Lewis & Son.”

“Which offer was accepted by the plaintiff in Court. It is therefore adjudged that the plaintiff recover,” &c.

The written offer to confess judgment was transmitted with the papers, on appeal, to the Circuit Court.

When the cause was called for trial in the Circuit Court, the plaintiff moved that the appeal be dismissed. The defendants thereupon, upon affidavit that they had verbally withdrawn their above written offer before the justice, moved for a *certiorari* upon the justice to certify a complete transcript. The Court refused the latter, and sustained the former motion, dismissing the appeal.

The Court did right in overruling the motion for a *certiorari*. The fact that the defendants had verbally withdrawn their offer to confess judgment, would be one to be proved by witnesses on the trial in the Circuit Court, if proof of such withdrawal would be admissible at all.

And, that motion being properly overruled, the case stood for trial with the defendants' offer to confess judgment admitted, making a *prima facie* case against them for the affirmance of the judgment of the justice. And as the defendants had no witnesses in attendance to prove the withdrawal of the offer to confess, if they could have been permitted to make such proof, and asked no time to enable them to procure such witnesses, it but remained for the

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v.
SHIRK.

Court to affirm the judgment of the justice, if the case was to be put upon trial. The dismissal of the appeal, if not strictly the correct practice, did no harm to the defendants, as it amounted but to an affirmance of the judgment of the justice.

On the other hand, if the defendants could not be allowed to withdraw their offer to confess, and the judgment was to be taken as one confessed, the dismissal of the appeal was right.

Per Curiam.—The judgment is affirmed with costs.

L. P. Milligan, for the appellants (1).

J. R. Slack, for the appellee (2).

(1) *Mr. Milligan* cited *Cheetham v. Tillotson*, 4 Johns. 499.

(2) *Mr. Slack* cited 2 R. S. p. 124, § 389.

BURGE v. SHIRK.

Thursday,
June 17.

APPEAL from the *Cass* Court of Common Pleas.

Per Curiam.—There was no demurrer to the complaint in this case, nor to the answer. No question arises, therefore, upon the pleadings.

As to one defendant, his default admitted the cause of action; as to the others it was proved.

It is objected that the judgment is not sufficiently certain in fixing the amount. It recites it in the commencement of the judgment.

The judgment is affirmed with 5 per cent. damages and costs.

H. P. Biddle and *B. W. Peters*, for the appellant.

D. D. Pratt, for the appellee.

THE STATE *v.* LENFESTY.May Term,
1858.STEVENSON
v.
BRUCE.APPEAL from the *Grant* Court of Common Pleas.*Per Curiam.*—Information for refusing to swear to a list of taxables as prepared by the assessor, &c.Thursday,
June 17.

A motion to quash was sustained. This was correct. The information did not set out either the substance or tenor of the list to which the defendant was required to swear; nor does it contain an allegation that he had signed it. *The State v. Atkinson*, 8 Ind. R. 409.

The judgment is affirmed.

J. Brownlee, for the state.*J. M. Harlan*, for the appellee.STEVENSON and Another *v.* BRUCE.

A suit against a guardian upon a contract made by him touching his ward's estate, is personal against the guardian, and not against him in his fiduciary capacity.

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Hence, he cannot, by resigning, cease to be a party to the suit and be made a witness.

A direction in the judgment in such a case that the levy be made of the effects of the ward, is error; but it will be deemed to be amended in the Supreme Court.

• APPEAL from the *Cass* Circuit Court.Thursday,
June 17.

Per Curiam.—*Thomas W. Stevenson*, and *John Green*, guardian of *Cosmo A. Stevenson*, a minor, leased to *Charles Bruce* a house and lot in *Logansport*, for five years, at 150 dollars a year. *Bruce* subleased the premises to another person, for four years and nine months, at 200 dollars a year.

Stevenson and *Green* refused to give possession to *Bruce*, or the sublessee. *Bruce* sued them for damages, and recovered 250 dollars. The Court rendered the judgment as against *Green*, to be levied of the effects of his ward, *Cosmo A. Stevenson*. Pending the suit, *Green* resigned his

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APOLIS, &C.,
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v.
DAVIS.

guardianship, and was offered as a witness for his co-defendant, but he was rejected.

A suit against a guardian upon a contract made by him touching his ward's estate, is personal against the guardian, and not against him in his fiduciary capacity. Hence, he could not, in this case, by resigning, cease to be a party to the suit. His rejection as a witness was, consequently, correct. It follows, also, that the direction in the judgment, to levy it of the ward's effects, is error. *Clark v. Casler*, 1 Ind. R. 243.

As to the damages, we cannot say, under the evidence, that they are excessive—perhaps they might have been a few dollars less, but we are not at liberty to interfere, for this reason, with the verdict.

The error in the form of rendering the judgment may be considered as amended in this Court.

The judgment is affirmed, with 1 per cent. damages and costs.

D. D. Pratt and S. C. Taber, for the appellants.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY
v. DAVIS.

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The Peru and Indianapolis Railroad Company v. Bradshaw, 6 Ind. R. 146, adhered to.

Where no valid cause of action, either at common law or by virtue of any statute, is set up in the complaint, the plaintiff is not entitled to judgment, though a verdict be found in his favor.

Friday,
June 18.

APPEAL from the *Shelby* Circuit Court.

WORDEN, J.—This was an action brought by the appellee, as the widow of *Owen Davis*, against the appellants, for causing the death of said *Owen*, who was killed upon the road of the appellants. Trial by a jury; verdict and judgment for plaintiff below. Motions for a new trial and in arrest of judgment overruled.

The action cannot be maintained at common law, and the statute which gave the widow a right of action in such case (1 R. S. 1852, p. 426), was repealed by § 784, 2 *id.* p. 205, as has already been determined by this Court in *The Peru and Indianapolis Railroad Company v. Bradshaw*, 6 Ind. R. 146. To this decision we adhere. Whether the appellant would be liable to the *personal representatives* of *Owen Davis*, upon the facts disclosed in this record, as provided for in 2 R. S. p. 205, § 784, is a question not before us, as the suit is not brought in such representative capacity.

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1858.

THE INDIAN-
APOLIS, &C.,
RAILR'D CO.

v.
DAVIS.

The motion in arrest of judgment should have been sustained.

Section 372, 2 R. S. p. 121, provides that "where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the Court, though a verdict has been found against such party."

There being no valid cause of action set up in the complaint, either at common law or by virtue of any statute, in favor of the appellee as widow of the deceased, under the above statute she was not entitled to judgment, although a verdict had been found in her favor. *Vide Lunning v. The State*, 9 Ind. R. 309.

The judgment is reversed with costs. Cause remanded for further proceedings not inconsistent with this opinion.

DAVISON, J. was absent.

J. S. Scobey, W. Cumbach, W. J. Peaslee and J. Ryman, for the appellants (1).

M. M. Ray, for the appellee.

(1) Counsel for the appellants made the following points:

1. The section of the statute under which this suit was brought, (1 R. S. p. 426, § 3,) is repealed by § 784, 2 R. S. p. 205. *Peru, &c., Co. v. Bradshaw*, 6 Ind. R. 146. And the repeal dates, of course, prior to the beginning of this suit.

2. But, it is well settled that in an action which is brought upon a statute, which statute is repealed before judgment in the action, and no saving clause is provided for existing actions, the repeal takes away the jurisdiction, and the subsequent proceedings of the Court are *coram non judice*, and void. *Hunt et*

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1858.

THE BOARD
OF TRUSTEES,
&C.,
v.
MAYER.

uz. v. Jennings, 5 Blackf. 195.—*Duncan et al. v. Duncan et al.*, 6 Ind. R. 28.—*Stephenson v. Doe*, 8 Blackf. 508.—*Lunning v. The State*, 9 Ind. R. 309.—*Butler v. Palmer*, 1 Hill, (N. Y.,) 324. And if this is true, when the statute is repealed during the pendency of the action, *a fortiori*, it must be true where the statute was repealed, as in this case, before the action was begun.

THE BOARD OF TRUSTEES OF THE WABASH AND ERIE
CANAL v. MAYER.

In an action against the trustees of the *Wabash and Erie Canal* for the killing of a horse by the falling of a bridge, the complaint did not aver that the plaintiff exercised reasonable care, nor that the injury happened without his fault. But one paragraph of the answer set up affirmatively that the injury happened through the carelessness and negligence of the plaintiff, to which there was no reply. *Held*, that the defendant was entitled to judgment on the pleadings, notwithstanding a verdict for the plaintiff.

Friday,
June 18.

APPEAL from the *Fountain* Court of Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellants, to recover damages for the killing of a horse, by the falling of a bridge across the *Wabash and Erie Canal*, by the carelessness and negligence of the appellants, the said bridge being out of repair and wholly insufficient, and it being the duty of the appellants, as is alleged, to keep the same in repair.

An answer was filed, of several paragraphs, the fourth of which averred that if the horse was killed, it was through the carelessness and negligence of the plaintiff.

To this paragraph of the answer, there was no replication filed, but the cause was tried by a jury, which resulted in a verdict for the plaintiff, on which judgment was rendered, a motion for a new trial being overruled.

Amongst other things, it is assigned for error that the cause was tried without an issue, the fourth paragraph of the answer being a valid defense not denied, nor confessed and avoided.

It is clear, that if the injury complained of occurred through the negligence and carelessness of the plaintiff, he cannot recover.

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1858.

THE BOARD
OF TRUSTEES,
&C.,
V.
MAYER.

In 2 Greenl. Ev. § 473, it is said that, "ordinarily, every person is bound to use reasonable care to avoid or prevent danger or damage to his person and property. Wherever, therefore, the injury complained of would never have existed but for the misconduct or culpable neglect of the plaintiff, as in the case of an obstruction within the limits of a highway, but outside of the traveled path, against which he negligently drove his vehicle; or in the case of a collision at sea; or, of his neglect to shore up his own house, for want of which it was injured by the pulling down of the defendant's adjoining house, notwithstanding due care taken by the latter; in these and the like cases the plaintiff cannot recover, but must bear the consequences of his own fault. * * * If the injury is *wholly imputable to the defendant*, it is perfectly clear that he is liable. * * * If the fault was *mutual*, the plaintiff cannot recover."

Numerous other authorities to the same effect might be cited, were it necessary.

The complaint in the case does not aver that the plaintiff exercised reasonable care, nor that the injury happened without his fault. In the case of *The President, &c., of the town of Mt. Vernon v. Dusouchett et al.* 2 Ind. R. 586, it was held that such an allegation was necessary in a declaration for an injury caused by a public nuisance in a street.

The fourth paragraph of the answer, however, sets up affirmatively that the injury happened through the carelessness and negligence of the plaintiff. This cannot be considered as a mere denial of anything alleged in the complaint, especially as the complaint does not aver due care on the part of the plaintiff, nor negative his fault in the matter.

This paragraph we think amounts to an affirmative, substantial defense to the action, and not being traversed nor avoided, we think it was erroneous to render judgment for the plaintiff below.

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1858.

ROBERTSON
v.
BERGEN.

It is provided by statute (2 R. S. p. 121, § 372), that, "where upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the Court, though a verdict has been found against such party."

It is clear that on the pleadings in the case, the defendant was entitled to judgment, notwithstanding the verdict, as the matter set up in the answer not being denied, must be taken to be true.

Per Curiam.—The judgment is reversed, with costs. Cause remanded with leave to the parties to amend or perfect their pleadings.

E. A. Hammegan and J. P. Usher, for the appellants.

ROBERTSON v. BERGEN.

Application upon affidavit to set aside a judgment rendered by default in a suit upon a promissory note, in *October*, 1853. At the *January* term, 1855, the Court refused to set it aside. The affiant said he mistook the Court in which his cause was pending. *Held*, that the case is not within any of the statutes authorizing the Circuit and Common Pleas Courts to set aside judgments.

Friday,
June 18.

APPEAL from *Johnson* Court of Common Pleas.

PERKINS, J.—Application upon affidavit, to set aside a judgment, rendered in *October*, 1853. At the *January* term, 1855, the Court refused to set aside the judgment. The judgment had been rendered by default, in a suit upon a promissory note.

We are not informed by the record, or brief of counsel, upon what statutory provision the relief sought was asked, and hence we must examine all, so far as we may be able to find them, bearing upon the subject, and ascertain within which it falls, if within any.

Courts of Common Pleas, and Circuit Courts, are authorized in five different cases, to set aside judgments in civil actions. As to criminal, see 2 R. S. p. 380.

1. They are authorized in civil actions, by a general provision, to grant new trials at the term judgments are rendered, or within a year afterwards, for causes discovered after the close of such term. 2 R. S. p. 119, §§ 354 to 357. These sections prescribe the practice in such cases.

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1858.

ROBERTSON
v.
BERGEN.

The present application is not made under these sections, and does not make a case falling within them.

2. In cases where parties have had only constructive notice, the judgment may be opened within five years, except in divorce cases. 2 R. S. p. 37, §§ 43 to 45.

The present case does not fall within these sections, as it is one in which actual service of process was had.

3. Judgments may be reviewed in certain cases, within three years, &c. 2 R. S. p. 165. See *McJunkin v. McJunkin*, 3 Ind. R. 30, in connection with this citation of the statute.

This is not such a proceeding.

4. In actions for the recovery of possession of real estate, judgments may be vacated, upon conditions, within one year. 2 R. S. p. 167.—*Benner v. Benner*, at this term (1).

This is not such a case.

5. The Court may relieve a party from a judgment at any time within a year, taken against him through mistake, surprise, or excusable neglect, &c. 2. R. S. p. 48, § 99.

Probably the appellant designed to proceed under this provision; but his affidavit does not show a state of facts entitling him to relief under it. He says he mistook the Court in which his case was pending.

Per Curiam.—The judgment is affirmed with costs.

F. M. Finch, for the appellant.

S. P. Oyler, for the appellee.

(1) *Ante*, 256.

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1858.

WHITNEY v. THE STATE.

10 404
144 90
WHITNEY
v.
THE STATE.

In this state, the sale of lottery tickets is prohibited—no lottery being authorized by statute.

It seems, that tickets in schemes in aid of schools and churches, and in gift exhibitions, are illegal articles—such schemes being disguised lotteries.

Such schemes may be prohibited by statute; and such a statute is not an inhibition of a free sale of property, but of a mode of swindling in disposing of property.

Criminal charges must be preferred with certainty, to the common intent that the Court and jury may know what they are to try—of what they are to acquit the defendant, or for what they are to punish him—that the defendant may know what he is to answer, and that the record may show, as far as may be, for what he has been put in jeopardy.

Thus, the act, or instrument, or both, constituting the basis of a prosecution, should be described with certainty in the official accusation, if possible, and if not, that fact should be stated as an excuse for want of certainty.

And the proof must, substantially, correspond with such description.

The best evidence must be adduced; as written instruments, themselves, instead of parol evidence of their contents.

Thus, in a prosecution for selling lottery tickets, parol evidence of their contents is not admissible, unless it be shown that the tickets themselves cannot be produced.

Friday,
June 18.

APPEAL from the *Franklin* Court of Common Pleas.

PERKINS, J.—Information for selling lottery tickets. Conviction and fine.

The information charged that the defendant sold “to *John Chapman* two lottery tickets in a scheme for the division of the following personal property, to-wit: Gold watches, silver watches, gold locket, gold breastpins, gold earrings, gold finger rings and pencil cases, to be determined by chance, for the sum of two dollars—said lottery and scheme for the division of said property, purporting to be drawn at *St. Louis*, in the state of *Missouri*, on the first day of *March*, eighteen hundred and fifty-seven, to be determined by chance,” &c.

A motion was made to quash the information because it did not sufficiently describe the tickets sold. The motion was overruled.

The defendant then pleaded the general issue, and went to trial. The following was all the evidence: *John Chap-*

man, the prosecuting witness, testified that he bought two tickets of the defendant, *Whitney*, at the county of *Franklin*, on, &c. "The tickets were printed. The figure part was done with a pen. I do not know where the tickets are. It may be possible they are about the house. I don't think I can find them. I have not made any search for them. The tickets were in *L. D. Lines's* lottery, to be drawn in *St. Louis* in *April*, for the division of gold and silver watches, gold pencils, gold earrings, gold locket, gold breastpins, gold finger rings, and pencil cases. There were, also, some sixteen prizes in money, varying from three hundred dollars to fifty. The drawing took place in *April*."

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1858.

WHITNEY
v.
THE STATE.

Objections were made to the proof of the contents of the tickets, and on account of the variance between the information and the proof; but the objections were not sustained.

In this state the sale of all lottery tickets is prohibited, as no lotteries are authorized by statute. Hence, tickets in numerous of the schemes gotten up to aid schools and churches, and gift exhibitions, being disguised lotteries, are illegal articles. The schemes themselves are but attempts to obtain funds by means detrimental to public morals and the people's virtue. A resort to these means may be prohibited by statute. A statute having such operation, is not the inhibition of a free sale of property, but of a mode of swindling in disposing of it. See *The Madison, &c., Co. v. Whiteneck*, 8 Ind. R. 217; *Den v. Shotwell*, 4 Zabriskie, 789; *The Governors, &c., v. The American Art Union*, 3 Selden, 228; *The State v. Clark*, 33 N. Hamp. R. 329.

As to the information, it is a general principle that criminal charges should be preferred with certainty, to at least a common intent, that the Court and jury may know what they are to try, and acquit the defendant of or punish him for; that the defendant may know what he is to answer to; and that the record may show, as far as may be, for what he has been once put in jeopardy.

In the application of this principle, it has been held, in

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1858.

WHITNEY
v.
THE STATE.

most cases, that the act or instrument, or both, constituting the basis of the prosecution, should be described with certainty, where it was in the power of the grand jury or other accusing tribunal to thus describe it or them; and where it was not, that such fact should be stated in the official accusation, as an excuse for the want of certainty.

It is a further principle, that the proof must correspond with the description contained in the charge, in matters material—those of substance. It is also a principle, that in proving the accusation, upon the trial, the best evidence must be adduced, if it can be obtained; as written or printed instruments themselves, instead of parol proof of their contents.

We think these principles have been violated in the case at bar. We are aware that the ruling of the Court below is in accordance with some reported cases; but we prefer to pursue the line of decision that has been adopted by this Court. See *Engleman v. The State*, 2 Ind. R. 91; *Markle v. The State*, 3 id. 535.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

W. G. Quick and *W. P. Quick*, for the appellant (1).

(1) Counsel for the appellant cited the following authorities:

An information under the R. S. of 1852 must contain all the substantial requisites of an indictment at common law. *The State v. Miles*, 4 Ind. R. 577.—*Mount v. The State*, 7 id. 654. The affidavit does not support the information. See *The State v. Lockstand*, 4 Ind. R. 572.

Parol testimony of the contents of a written instrument cannot be given, unless the absence of the instrument itself is first accounted for. *Jackson v. Cullum*, 2 Blackf. 228.—*Carlton v. Litton*, 4 id. 1.—*Smith v. Reed*, 7 Ind. R. 242.

The evidence showed that there was a division of more property than was alleged in the information. This was a fatal variance. *Tardy v. The State*, 4 Blackf. 152.—*Groves v. The State*, 6 id. 489.—*Swails v. The State*, 7 id. 324.—*Wilcox v. The State*, id. 456.—*The State v. Wilson*, 7 Ind. R. 516.

KIMBERLING *v.* HALL and Another.May Term,
1858.KIMBERLING
v.
HALL.

Under the code, the use of the traverse in the reply is precisely similar to its use in the answer. It simply puts at issue the truth of the matters alleged. Hence, new matter in avoidance of the answer must be specially pleaded: otherwise, it cannot be proved on the trial.

APPEAL from the *Madison* Court of Common Pleas. *Friday, June 18.*

DAVISON, J.—The appellees were the plaintiffs below, and *Kimberling* was the defendant.

The complaint charges the defendant with having seized and appropriated to his own use a certain quantity of corn and corn-fodder belonging to the plaintiffs, of the value of 300 dollars.

The following is the defense set up in the answer: One *Evans*, being the owner in fee of a tract of land, rented it to one *Bradberry* for the term of ten years. Before the expiration of the lease, the defendant purchased the land of *Evans*, subject to the lease. After this the defendant bought of *Bradberry*, the lessee, his unexpired term. The terms of the purchase were reduced to writing and are as follows:

“*July 27.* Agreement between *William T. Bradberry* of the first part, and *Lewis Kimberling* of the second part. The party of the first part has now sold to the party of the second part the lease on which he, *Bradberry*, now lives, for 100 dollars. He agrees to give possession of all the ground on the 20th of *September*, 1855, and he reserves the house until the first day of *October* next.

William T. Bradberry.”

Defendant avers that, at the date of this agreement, there was standing and growing upon said lease, a crop of corn, unmaturing, which remained thereon growing and unsevered until after possession was given by said *Bradberry*, there being in and by said agreement no reservation, except as to the possession of the house until the first of *October*, 1855; and that the defendant, having in accordance with the agreement entered upon and into possession of the lease, did take and carry away both corn and fodder, as he

May Term, 1858. lawfully might, he being the owner thereof by virtue of his purchase, &c.

KIMBERLING
v.
HALL

The plaintiffs replied generally, denying each and every allegation in the answer. The Court tried the cause, and found for the plaintiffs. New trial refused, and judgment.

Upon the trial, the defendant gave in evidence the above agreement, and rested. Whereupon the plaintiffs offered to prove by parol that *Bradberry*, at the time he executed the agreement, reserved the corn crop, and that the same never was sold to the defendant. The introduction of this evidence, though resisted by the defendant, was admitted by the Court; and its admission raises the only question in the case.

The answer, it will be seen, does not traverse the facts stated in the complaint, but sets up new matter in avoidance of the action, to which the plaintiffs have simply replied by a general denial. What, then, is the effect of this reply? The code declares that "all defenses, except the mere denial of the facts alleged by the plaintiff, shall be specially pleaded;" and that "when the answer contains new matter, the plaintiff may reply thereto, denying each allegation, &c., and he may allege any new matter constituting a defense to the answer and not inconsistent with the complaint." 2 R. S. p. 42, §§ 66, 67. In view of these enactments, it is evident that the use of the traverse or denial in the reply is precisely similar to its use in the answer, and that, in effect, it simply puts in issue the truth of the matters alleged. The result is that new matter in avoidance of the answer must be specially pleaded; otherwise, it cannot be proved on the trial. We are, therefore, of opinion that the evidence, in this instance, tending to prove the reservation of the corn crop, was not admissible under the general denial.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Davis, for the appellant.

R. Lake, for the appellees.

THE PERU AND INDIANAPOLIS RAILROAD COMPANY v. HASKET.

May Term,
1858.

THE PERU,
&C., RAILR'D
COMPANY.

v.
HASKET.

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A railroad company is not liable under the statute of 1853, for an injury to stock resulting from fright at their cars, where the animal was not touched by any car, locomotive, or other carriage belonging to the company.

APPEAL from the *Tipton* Court of Common Pleas.

Friday,
June 18.

DAVISON, J.—*Hasket* sued the railroad company before a justice of the peace. In the complaint, it is alleged that the plaintiff's mare, of the value of 125 dollars, was so injured on the defendant's railroad, by the locomotive and cars used thereon, that she thereby became worthless and of no value to the plaintiff; the said railroad not being securely fenced, &c. The demand is laid at 100 dollars.

Before the justice there was judgment for the plaintiff. The defendant appealed. In the Common Pleas, the case was submitted to the Court for trial. The facts are, substantially, as follows:

On the 24th of *May*, 1855, the defendant's passenger train was running the road as usual. About 100 rods distant from a culvert in the road, a mare belonging to the plaintiff was discovered near the track, 75 yards in advance of the train. The engineer gave the usual signal by the steam whistle, and then whistled down brakes, reversed the engine, and the brakes were applied. The mare, at the sound of the whistle, ran on the track before the train, until she came to the culvert, and then jumped so as to clear the culvert, and fell on the west side of the track. *She was not touched by the locomotive or any part of the train.* It was proved that the mare's left fore leg was broken, and that she was otherwise badly injured. There is no evidence tending to prove the company or her employes guilty of willful misconduct or negligence in running the train. The road was not fenced.

The Court found for the plaintiff; and, having refused a new trial, gave judgment on the finding.

We have a statute which enacts—1. That whenever any

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THE PERU,
&C., RAILR'D
COMPANY.

V.
HASKET.

animal shall be killed or injured by the *cars or locomotive, or other carriages*, used on any railroad in this state, the owner thereof may sue the railroad company before a justice of the peace. 2. On the hearing of the cause, the justice or jury trying the same shall give judgment for the plaintiff for the value of the animal destroyed or injury inflicted, without regard to the question whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident. 3. This act shall not apply to any railroad securely fenced, and such fence properly maintained by the company. Acts of 1853, p. 113.

The present suit was instituted under this statute, and the question to settle is, do the facts stated bring the case within its provisions? The appellant contends that the statute contemplates a direct injury; that, in this instance, the mare was not stricken, or even touched by the locomotive or any part of the train, and hence, the appellee, in the absence of misconduct or negligence on the part of the company's employes, is, for the injury sustained, without remedy. We are inclined to favor this construction. The language of the enactment is, "shall be killed or injured by the cars, or locomotive, or other carriages," &c. These words, in their ordinary import, evidently involve the idea of actual collision; and it would not, in our opinion, be consistent with the intent of the act, to give them such an exposition as would cover a case of consequential damages. No doubt the train caused the animal to take fright, and the injury was the result of such fright. But suppose the mare, at the sound of the whistle, instead of running upon the road, had run from the road, and while thus running had received an injury,—would the company be liable? It seems to us they would not. The principle of the case hypothetically stated would be alike applicable to the case at bar.

As the record before us shows plainly that the mare was not injured by the defendants' cars, or locomotive, or other carriages, we are of opinion that the case made by the evi-

dence is not embraced by the statute, and that a new trial should have been granted.

May Term,
1858.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

THE STATE
v.
TURNER.

J. Green, for the appellants.

W. Garver, for the appellee.

THE STATE on the relation of CLARK v. TURNER and Others.

The Circuit Court has exclusive jurisdiction of suits on the bonds of administrators, &c., where the damages claimed are laid at 1,000 dollars or upwards.

APPEAL from the *Hendricks* Court of Common Pleas. *Friday, June 18.*

DAVISON, J.—This was a suit by the state on the relation of *Clark*, administrator *de bonis non* of the estate of *Job Turner* deceased, against *Isabella Turner*, former administratrix of the decedent, and her sureties on her bond, &c. The bond is in the penalty of 15,000 dollars, and is conditioned in the usual form, for the discharge of the duties of the administration, &c. For breaches it is alleged that she, *Isabella*, had failed to account to the Common Pleas, or to the relator as administrator *de bonis non*, for 6,470 dollars, money which had come to her hands as administratrix; that she had failed to use due diligence in the collection of money, &c.; and that she had converted to her own use a large amount of money belonging to the decedent's estate. Damages are laid and claimed to the amount of 2,000 dollars. Demurrer to the complaint sustained, and final judgment for the defendants.

The main question to settle is, had the Common Pleas jurisdiction?

Section 11 of an act to establish that Court, approved May the 14th, 1852, provides that, "in all civil cases, except for slander, libel, breach of marriage contract, action on

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v.
TURNER.

official bond of any state or county officer, and where the title to real estate shall be in issue, the Common Pleas shall have concurrent jurisdiction with the Circuit Court, when the sum due or demanded, or damages claimed, shall not exceed one thousand dollars." And § 5 of the act providing for the organization of Circuit Courts, approved June 1, 1852, declares, "That such Courts, in their respective counties, shall have original, exclusive jurisdiction in all cases of slander, libel, breach of marriage contract, and when the title to real estate shall be in issue, and in all other civil actions where the amount involved is one thousand dollars or upwards." 2 R. S. pp. 6 and 18.

These sections are relied on in support of the demurrer, and they seem to be effective for that purpose; because the suit in this case was plainly a civil action within the meaning of both enactments, and being so, the damages claimed are an amount to which the jurisdiction of the Common Pleas does not extend.

But the appellant refers to §§ 4, 5, and 8 of the above act of *May*, 1852, and contends that they fully sustain the jurisdiction.

We think differently. The fourth section gives the Common Pleas original and exclusive jurisdiction of all matters relating to the settlement and distribution of decedents' estates, and all actions against executors and administrators.

The fifth, confers upon the Circuit and Common Pleas Courts concurrent jurisdiction in all actions against heirs, devisees, and *sureties* of executors, administrators and guardians. And the eighth allows guardians, executors and administrators to sue in the Common Pleas any and all persons against whom any claim, debt or demand of any kind whatever accrues to them in such fiduciary capacity. The fourth and eighth sections evidently do not contemplate suits upon administration bonds, and are, therefore, not applicable to the case at bar. They simply authorize suits in favor of and against the executor or administrator alone, in his fiduciary capacity; but in this instance, the suit is by the state, and not by the administrator, and is against the former administratrix—one who is not clothed

with such capacity—and her sureties. We have decided that the suits which these sections contemplate are not limited by § 11 of the same act; because they are not within the meaning of the terms civil cases as used in that section. *Fleece v. The Indiana, &c, Railroad Co.* 8 Ind. R. 460.

May Term,
1858.

CHASE
v.
SIMS.

The concurrent jurisdiction given by the fifth section, so far as it relates to sureties of executors or administrators, must be limited to within 1,000 dollars; otherwise the eleventh section of the Common Pleas act, and the fifth section of the act organizing Circuit Courts, to which we have referred, cannot be reconciled. Both contemplate civil actions. See *Fleece v. The Indiana, &c., Railroad Co., supra*. And as the latter expresses the last intent of the legislature, we are inclined to hold that the Circuit Court has exclusive jurisdiction in all such actions, when the damages claimed are laid at one thousand dollars or upwards. It follows that the present suit, being upon an administration bond, and a civil action for the recovery of 2,000 in damages, the Common Pleas had no jurisdiction.

Per Curiam.—The judgment is affirmed with costs.

C. C. Nave, for the state.

H. C. Newcomb, J. S. Harvey and J. M. Gregg, for the appellees.

CHASE v. SIMS.

APPEAL from the *Bartholomew* Circuit Court.

Friday,
June 18.

Per Curiam.—Suit commenced before a justice of the peace upon a note. Trial and judgment for the plaintiff for the amount of the note.

Appeal to the Circuit Court. Trial. Judgment before the justice affirmed.

The defense set up was a failure of consideration. The question is entirely upon the evidence.

May Term,
1858.

The judgment is affirmed with 5 per cent. damages and costs.

LEGGET
v.
HARDING.

R. Hill, for the appellant.

W. Herod and *S. Stansifer*, for the appellee.

SHIRKEY v. RUTHERFORD.

Friday,
June 18.

APPEAL from the *Union* Court of Common Pleas.

Per Curiam.—Suit by *Rutherford* against *John A. Shirkey*, upon a note made by him to one *N. Shirkey*, and by *N. Shirkey* indorsed to *Rutherford*.

Defense, that the note was given without consideration, and for the accommodation of *N. Shirkey*. Trial by jury. and verdict for the plaintiff below. Motion for a new trial overruled, and judgment on the verdict.

The case is before us on the evidence.

The note is *prima facie* evidence that it was given upon a valuable consideration, and although there was evidence strongly tending to show that it was a mere accommodation note, without consideration moving from the payee to the maker, yet the jury having passed upon it, we are not disposed to disturb their verdict.

The judgment is affirmed with costs.

J. F. Gardner, for the appellant.

J. Yaryan, for the appellee.

LEGGET v. HARDING.

Friday,
June 18.

APPEAL from the *Shelby* Court of Common Pleas.

Per Curiam.—Suit upon a lease containing mutual obligations. Allegations of performance on the part of the

plaintiff, and breaches on that of the defendant. Issues of fact, judgment for the plaintiff. May Term,
1858.

But two questions are presented by the record. The first is upon an instruction, and is settled by the cases of *Wood v. Commons*, 3 Ind. R. 418, and *Cory v. Silcox*, 6 *id.* 39. The principle governing is this: that where an instruction is given narrower than the issues made by the pleadings, and yet assuming to cover the whole question in dispute, this Court will presume, the record not showing the contrary, that the parties, on the trial, had limited their controversy to the ground covered by the instruction; so that, in its application to the case it was right, if asserting no incorrect principle of law.

LEGGET
v.
HARDING.

The other question is this: The lease was for one year, but did not, in the body of it, state when the year was to commence. It was dated on the 2d of *October*, 1854. The defendant proved that it was not actually signed till *February*, 1855. The plaintiff was then permitted to prove that the contract was made and reduced to writing on the 2d of *October*, 1854; that the year was to commence at that date; that possession of the mill was then given and received; and that, by accident, or carelessness the agreement was not actually signed till *February*, though it was then signed with reference to its having taken effect on the day of its date. We think the Court did not err in permitting the proof. See Taylor's L. & T. p. 89; Chit. on Bills 615.

The judgment is affirmed with 5 per cent. damages and costs.

W. J. Peaslee, for the appellant.

M. M. Ray, for the appellee.

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1858.

THE JEFFERSONVILLE RAILROAD COMPANY v. MARTIN.

THE JEFFER-
SONVILLE
RAILR'D CO.
v.
MARTIN.

A suit brought in the Common Pleas against a railroad company for killing cattle, is not governed by the statute of 1853, but by the common-law rules. Hence, the complaint must charge negligence, unskillfulness, or willful misconduct, on the part of the company or their agents, and that such negligence, &c., was the proximate cause of the injury.

Friday,
June 18.

APPEAL from the *Bartholomew* Court of Common Pleas.

DAVISON, J.—The appellees, who were the plaintiffs, sued the railroad company in the Common Pleas, to recover the value of a horse killed by a locomotive of the company, while running on their road.

The complaint alleges that the horse belonged to the plaintiffs, was of the value of 200 dollars, and that the railroad was not fenced; but it fails to charge the company, or their agents, with negligence, or unskillfulness, or willful misconduct in running the train.

The defendants demurred to the complaint; but their demurrer was overruled. Thereupon they answered, 1. By a general denial. 2. That the plaintiffs, at the time the horse was killed, did not occupy or own the land adjoining the road, or through which it ran, but the horse was suffered by them to run at large, &c. To the second paragraph there was a demurrer sustained. The issue made by the general denial, was submitted to the Court, who found for the plaintiffs 140 dollars. New trial refused, and judgment, &c.

The first inquiry relates to the sufficiency of the complaint. It is alleged to be defective because the plaintiffs have failed to aver negligence, &c., on the part of the company.

We have a statute which contains the following provisions: 1. That when any animal, &c., shall be killed or injured by the locomotives, &c., of any railroad in this state, the owner may sue before a justice of the peace. 2. On the hearing of said cause, the justice or jury trying the same shall give judgment for the plaintiff for the value

of the animal destroyed or injury inflicted, without regard to the question whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident. 3. This act shall not apply to any railroad securely fenced in, and such fence securely maintained by the company. Acts of 1853, p. 113.

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1858.

THE JEFFER-
SONVILLE
RAILROAD CO.
V.
MARTIN.

In *Whiteneck v. The Madison, &c., Railroad Co.*, it was held that the statute to which we have referred is inoperative, so far as it gives, in point of amount, unlimited jurisdiction to justices of the peace. 8 Ind. R. 217. But the present suit is for the recovery of an amount to which the jurisdiction of a justice does not extend, and was, therefore, properly instituted in the Common Pleas. And the inquiry at once arises, does the above statute at all apply to suits originally commenced in that Court? It says the owner *may sue before a justice of the peace*, and on the hearing of said cause *the justice* or jury trying the same shall give judgment. Indeed, all its provisions directly relate to the commencement and trial of an action before a justice, and cannot, therefore, be applied to the case at bar.

The result is that the present suit, having been commenced in the Common Pleas, must, in its trial be governed by common-law rule. And tested by that rule, the complaint is obviously defective, because it does not allege negligence, unskillfulness, or willful misconduct, on the part of the company's agents in running the train, and that such negligence, &c., was the proximate cause of the plaintiff's damage. 10 Mees. & Welsb. 546.—5 Hill. 282.—7 B. Mon. 538.—16 Conn. R. 420.—6 Ind. R. 141.—5 Ind. R. 111. It follows that the demurrer should have been sustained.

The second defense involves the question whether the plaintiffs, not being the owners of the land adjoining the road at the point where the horse was killed, are entitled to recover on the ground that the road is not fenced. The solution of this inquiry depends upon a construction of the act of 1853. We have just held that that act does not apply to the case before us. The record, therefore, does not require a decision of the question.

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1858.

GROVER
v.
BRUCE.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

W. Herod and *S. Stansifer*, for the appellants.
R. Hill, for the appellee.

KUNKLER v. TURNING.

Saturday,
June 19.

APPEAL from the *Jefferson* Court of Common Pleas.

Per Curiam.—Suit upon a note. Judgment for plaintiff.

It is contended the note was not fully and accurately described in the complaint. But the note was filed with the complaint, as a part of it. The objection made is answered by *Ellis v. Miller*, 9 Ind. R. 210.

The note is alleged in the complaint to have been made by *Gustavus A. Kunkler*, by the description of *G. A. Kunkler*. The note was given in evidence. Its admission is justified by the cases cited in *Grover et al. v. Bruce et al.*, at this term (1).

There was no motion for a new trial.

The judgment is affirmed with 10 per cent. damages and costs.

S. C. Stevens, for the appellant.

H. W. Harrington and *J. C. Thom*, for the appellee.

(1) The case next following.

GROVER and Another v. BRUCE and Another.

Saturday,
June 19.

APPEAL from the *Vigo* Circuit Court.

Per Curiam.—Suit upon notes payable to *E. M. Bruce*

& Co. The complaint is by *Eli M. Bruce* and *Henry Bruce*, jun., and alleges the notes were payable to them. Copies of the notes were set out in the complaint. A demurrer to the complaint was overruled. The notes were admitted in evidence under it. Thus far there was no error. *The Warden, &c., of St. James's Church v. Moore et al.*, 1 Ind. R. 289. — *Louden v. Walpole*, *id.* 319. — *Muirhead v. Snyder*, 4 *id.* 486. See *Abernathy v. Reeves et al.*, 7 *id.* 306.

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1858.

KAUFMAN
V.
FORCHHEIMER.

It is contended that the evidence did not sustain the judgment; but the record does not purport to contain all the evidence, and the case is, therefore, not before us on the merits.

The judgment is affirmed, with 3 per cent. damages and costs.

S. Claypool, *A. B. Crane* and *W. E. McLean*, for the appellants.

KAUFMAN and Another v. FORCHHEIMER and Others.

APPEAL from the *Grant* Circuit Court.

Saturday,
June 19.

Per Curiam.—This was a suit by the appellees against the appellants. The complaint contained two paragraphs, the first upon a promissory note, the second upon an account.

The defendants did not appear in the Court below, and there was a judgment as by default. The Court assessed the damages. This is assigned as error.

There was no error in this. The statute expressly gives the authority (2 R. S. p. 115, § 340); and even in the absence of a statute, the finding would be sustained, for the record shows it was upon the note alone.

The next error complained of is, that the summons which was served upon them in the case, commanded the defendants to appear on the second day of the then next term of

May Term, 1858. the Court. This question has already been decided. *Kaufman et al. v. Sampson et al.*, 9 Ind. R. 520.

CAMPBELL v. THE STATE. The judgment is affirmed with 10 per cent. damages and costs.

J. Brownlee and *H. Kelly*, for the appellants.

A. Steele and *H. D. Thompson*, for the appellees.

OSBORNE v. OSBORNE.

Saturday,
June 19.

APPEAL from the *Lagrange* Court of Common Pleas.
Per Curiam.—There is no bill of exceptions in this case.
No question is presented.

The judgment is affirmed, with 1 per cent. damages and costs.

D. H. Colerick and *R. Parrett*, for the appellant.

J. B. Howe, for the appellee.

CAMPBELL v. THE STATE.

Saturday,
June 19.

APPEAL from the *Allen* Circuit Court.

Per Curiam.—Indictment as follows:

“*State of Indiana v. John Campbell*.—Indictment for larceny in the *Allen* Circuit Court, at *November* term, 1857:

“The grand jury of the county of *Allen*, in the state of *Indiana*, upon their oath, charge that on the 4th day of *November*, 1857, at said county of *Allen*, in said state of *Indiana*, feloniously did steal, take and carry away one twenty dollar gold coin, money of the *United States of America*, of the denomination and value of twenty dollars, the per-

sonal goods of one *Charles W. Waldin*, contrary to the form of the statute in such case made and provided.”

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1858.

Signed, &c.

Trial, conviction, and sentence to the penitentiary. A motion in arrest was overruled.

THE BOARD
OF COMMISSIONERS, &c.,
v.
TUFTS.

The judgment must be reversed. The indictment does not charge any person with the commission of the larceny.

The judgment is reversed. Cause remanded to be dismissed.

L. M. Ninde and ——— *Puckett*, for the appellant.

S. J. Stoughton, for the state.

THE BOARD OF COMMISSIONERS OF DEARBORN COUNTY v.
TUFTS and Another.

APPEAL from the *Dearborn* Circuit Court.

Saturday,
June 19.

Per Curiam.—In this case the evidence is not upon the record, nor does an exception to any ruling of the Court appear to have been taken, nor was there a motion for a new trial made, or any other statutory mode pursued by which to bring the case properly before this Court, so that we could pass upon the questions attempted to be presented for our decision. 9 Ind. R. 366.—*Id.* 356.—*Id.* 286.—*Id.* 182, 181, 180.—2 R. S. pp. 115, 116.—*Jolly v. The Terre Haute Drawbridge Co.*, 9 Ind. R. 417, 421.—8 *id.* 96.—*Id.* 244.—*Id.* 452.—*Id.* 457.—*Id.* 462.

The judgment is affirmed with costs.

J. T. Brown and *W. S. Holman*, for the appellants.

T. Gazlay, for the appellees.

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1858.

DUNKIN and Another v. TAYLOR and Another.

REED
v.
SWINNEY.

Saturday,
June 19.

APPEAL from the *Fountain* Court of Common Pleas.

Per Curiam.—The writ in the case issued in the name of *Taylor* and *Embree*, plaintiffs. The complaint was filed in the name of *James Taylor* and *Jesse Embree*, partners under the name of *Taylor* and *Embree*, against the defendants. The defendants moved to dismiss the suit for the variance. The Court overruled the motion. The issues were then made up. Trial; and judgment rendered for the plaintiffs.

The judgment is affirmed with 5 per cent. damages and costs.

M. M. Milford, for the appellant.

I. A. Rice, for the appellees.



REED and Others v. SWINNEY and Wife.

Saturday,
June 19.

APPEAL from the *Cass* Circuit Court.

Per Curiam.—This was an action of waste against a tenant in dower, under the statute of 1843. A demurrer was filed and sustained to the complaint. No exception was taken to the ruling of the Court. The plaintiffs below bring the case here.

There is nothing before us in such form as to enable us to determine the questions attempted to be raised.

The judgment is affirmed with costs.

H. P. Biddle and *B. W. Peters*, for the appellants.

D. D. Pratt and *S. C. Taber*, for the appellees.

CARSON v. EARLYWINE.

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1858.Howe
v.
THE STATE.APPEAL from the *Shelby* Court of Common Pleas.

Per Curiam.—This was a suit upon an award. There was no answer to the complaint filed. The case was submitted to the Court for trial without a jury, and was, so far as appears by the record, a trial without an issue. This was erroneous, according to *Dart v. Lowe et al.*, 5 Ind. R. 131.

The judgment is reversed with costs. Cause remanded with leave to defendant to file an answer.

J. Harrison and *W. J. Peaslee*, for the appellant.

Saturday,
June 19.

 HOWE v. THE STATE.
APPEAL from the *Hamilton* Court of Common Pleas.Saturday
June 19.

Per Curiam.—Information against *Samuel Howe* for re-tailing. Conviction and fine of 20 dollars. A motion to quash was made and overruled before the trial.

106	423
149	235

The record does not disclose, expressly, as to the statute under which the prosecution was instituted, but we conclude it was under the liquor law of 1855. If so, the information should have been quashed, because that law is unconstitutional and void. This is the unanimous opinion of the Court (1).

But suppose the prosecution to have been under the liquor law of 1853, still the information should have been quashed because it contains no negative of a license to sell. As the act of 1853 was a license law, an information founded upon it should negative that the defendant had license to sell. 3 Wat. Arch. p. 609–78. U. S. Crim. Law, 524, *et seq.* The question, therefore, whether the act of 1853 is in force does not arise in this case.

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1858.

The judgment is reversed. Cause remanded to be dismissed.

SNYDER
v.
LANE.

D. Moss, for the appellant.

(1) *O'Daily v. The State*, 9 Ind. R. 494.

SNYDER v. LANE.

In the assignment of causes of demurrer, the precise language of the statute need not be used.

Suit upon the covenants in a deed. Breach, that the lands conveyed were encumbered by a mortgage, which the plaintiff had paid off. Answer, 1. That the plaintiff, when he purchased the lands, had notice of the mortgage. 2. That the mortgage was not due. Demurrer, assigning for cause—1. That the knowledge of the incumbrance was immaterial, as the defendant had expressly covenanted against it. 2. That the mortgage being an incumbrance, the plaintiff had a right to remove it, and sue upon the covenant.

Held, 1. That the causes of demurrer were well assigned.

2. That the notice of the incumbrance did not exclude it from the operation of the covenant.
3. That the vendee had a right to remove the mortgage (even before it was due) and sue upon the covenant.

Saturday,
June 19.

APPEAL from the *Wayne* Court of Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, sued *Snyder* upon the covenants in a deed of conveyance. In the complaint, it is alleged that *Snyder*, by deed in fee, conveyed certain lands in *Wayne* county, to the plaintiff; and that in and by said deed it was covenanted, 1. That the lands were unencumbered. 2. That the grantor is lawfully seized, &c. 3. That he will warrant and defend against all claims, &c.

The breach assigned is, that the lands, at the time of the conveyance, were lawfully encumbered by a mortgage executed by one *James A. Culbertson*, a former owner, to the state, for the use of the surplus revenue fund, to secure the payment of 291 dollars with interest, &c. And it is averred that the plaintiff, on the first of *June*, 1857, the above

sum being due and payable, fully paid the same to the auditor of said county, and procured the incumbrance to be removed and satisfied; wherefore he demands judgment, &c. The defendant answered, 1. That the plaintiff, when he purchased the lands, had full knowledge of the existence of the mortgage. 2. That by the laws of *Indiana* extending the time for the payment of mortgages to the surplus revenue fund, the mortgage in question is not yet due, and payment thereof could not be required, &c.

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1858.

SNYDER
v.
LANE.

Demurrers to the answer. The causes of demurrer are thus stated: Plaintiff demurs to the first paragraph because "the knowledge of the incumbrance is immaterial, as the defendant has expressly covenanted against it." And as to the second paragraph plaintiff says that "the mortgage was an incumbrance, and he had a right to remove it, and sue on his covenant." The demurrers were sustained, and final judgment given for the plaintiff.

The appellee contends that the demurrers should have been set aside, because they do not specify either of the six causes prescribed by the statute. See 2 R. S. p. 38, § 50. We have decided that in the assignment of such causes, the language of the statute need not be pursued. It will be sufficient if they designate, certainly, the alleged defects to which they refer. *Lagow v. Neilson*, at this term (1). In the case at bar, the assignments point out the objections relied on with a sufficient degree of certainty. Hence, the questions raised by the demurrers are properly before us for consideration.

The next inquiry relates to the first defense. Does mere notice to the vendee, at the time he receives his deed, of an existing incumbrance, exclude it from the operation of an express covenant against incumbrances? This question is settled in *Medler v. Hiatt*, 8 Ind. R. 171. There it was held that such incumbrances are not presumed to be so excluded, though their existence was known to the vendee when the deed was executed. This authority is directly in point. It follows that the first paragraph of the answer constitutes no bar to the action.

The second defense is also defective. The mortgage,

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1858.

THE STATE
v.
ROYSTER.

by its terms, was due and payable, and being a valid incumbrance, the vendee had a perfect right to pay the money and sue on his covenant. We have been referred to no statute, nor do we know of any, applicable to the mortgage in question, enlarging the time of its payment; but suppose the existence of such statute, it would not, it seems to us, bind the vendee to suffer an incumbrance calculated to impair the validity of his title, to rest on the land.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

J. S. Newman and J. P. Siddall, for the appellant.

J. Perry, for the appellee.

(1) *Ante*, 183.

THE STATE v. ROYSTER.

The *Indianapolis and Brownsburgh Plankroad Company*, organized under the general plankroad act of 1855, had a right to erect a toll-gate on the portion of their road east of *White river* (the road west of the river being completed), though that portion did not exceed one mile. In other words, the bridging of that stream was not a prerequisite to the right to collect toll upon the mile of road east of the river.

Saturday,
June 19.

APPEAL from the *Marion Circuit Court*.

WORDEN J.—This was a prosecution by information, against the defendant, *Royster*, for destroying a toll-gate on the road of the *Indianapolis and Brownsburgh Plankroad Company*. It was commenced in the Common Pleas, and transferred to the Circuit Court, for trial, on account of the interest, in the matter, of the Common Pleas judge.

There was a plea of not guilty; trial by jury, verdict and judgment for defendant.

The cause is brought to this Court, by the prosecuting attorney, under the provisions of § 119, p. 377, 2 R. S.

1852, upon points of law reserved during the prosecution below. May Term,
1858.

It appeared in evidence that the *Indianapolis and Brownsburgh Plankroad Company*, originally organized under their charter, and afterwards adopted the general plankroad law of 1852, and in *November*, 1856, they adopted the plankroad law of 1855. That their road extended from *Indianapolis*, in *Marion* county, to *Pittsborough*, in *Hendricks*, a distance of seventeen miles. That all the road was completed except the bridge over *White River*, and the grading of the banks of the river, making a distance of unfinished road not exceeding 400 or 500 feet. That in consequence of this break and want of a bridge, the travel had to leave the road on the west bank of *White River*, and go some distance down the river and cross at a ford, and upon ascending the east bank of the river, again enter upon the plankroad, traveling about one half mile after leaving the road before entering upon it again. That the toll-gate in question was situate about a mile east of *White River*, on the road, and that there was only about a mile of the finished road east of said river. That the toll demanded at said gate, was a trifle less than the rate of toll prescribed for one mile of travel upon said road. That the defendant while traveling said part of said road, refused to pay the toll demanded, which did not exceed the rates prescribed by law upon legal roads, and upon such refusal, the gate was shut against him, whereupon without offering to pay toll he demolished the gate with an ax. THE STATE
V.
ROYSTER.

Upon this state of facts the prosecuting attorney asked the Court to charge the jury as follows, viz.:

1. "That if they find the *Indianapolis and Brownsburgh Plankroad Company* had, before the time of the committing of the acts by the defendant charged in the information, completed three consecutive miles of their road, as contemplated by their charter, the said company was authorized to erect toll-gates upon any other completed portion of the road less than three miles, and demand and collect lawful toll for traveling thereon, although such other completed

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portion upon which a toll-gate may have been erected was not in direct and immediate connection with three continuous, completed miles.

2. "If the jury find, as aforesaid, that three consecutive miles had been so as aforesaid completed, the company had a right to erect a toll-gate and demand toll on any other completed portion or portions of the road, provided the toll so demanded was according to the rate per mile that the company might lawfully charge.

3. "It is not necessary to show that *White River* or any other stream had been bridged by the company, to entitle them to demand and claim toll on the portion or portions so as aforesaid completed.

4. "If the whole road had been completed as aforesaid, except the bridging, the company were entitled to erect and maintain toll-gates at such points as they considered expedient, and demand and receive the lawful tolls for traveling such road, according to the distance traveled on the road, excluding the points not bridged, or not planked or graveled."

These instructions the Court refused, and the state excepted; whereupon the Court gave the following, amongst other instructions, to which the state also excepted, viz.:

"To entitle the company to erect the toll-gate in question, there must be, on that part of the line of the road three consecutive miles thereof finished, and if there were not, the company had no right to erect the gate; and the circumstance that there may have been three or more miles of the road elsewhere finished, does not give the right to erect a gate upon a part of the road where there is not three consecutive miles."

From the evidence it appears that the entire road was completed, except the bridging of *White River*, and the grading of its banks; and the question is whether the company can erect a gate and charge toll on that part of the road east of the river, being less in extent than three miles.

It is conceded that the act of 1855 (Acts of 1855, p. 148) governs the case.

The 3d section provides for toll-bridges across streams, under such circumstances and restrictions as are therein prescribed.

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1858.

THE STATE
V.
ROYSTER.

The 4th section provides that "Whenever three consecutive miles of such road shall have been completed, or if the whole of the road shall be less than three miles in length, then, in such case, when the whole of such road shall be completed, the directors of such company may erect toll-gates, at such points and at such distances from each other as they may deem it proper, and exact tolls from persons traveling on the road," &c.

The 7th section provides "That it shall be lawful for any plank, macadamized, turnpike, or gravel road company, to erect toll-gates at such convenient points on their road, as in their judgment will best protect the company from imposition and loss, though such gates should be less than five miles apart," &c.

We are of opinion that, taking the provisions of the above sections of the law together, the company had a right to erect a toll-gate on the part of the road east of *White River*, and charge toll for traveling thereon, although there was less than three miles of the road on that side of the river; or in other words, that the bridging of the stream was not a prerequisite to their right of charging toll for the travel on the road, on the east side of the river.

Whether or not a plankroad company would have the right to erect a gate and charge toll, on a part of their road less than three miles in extent, where another part of their finished road was of that, or greater extent, as a general proposition, is a question not before us, as the facts in the case before us do not involve such question, and therefore we do not pass upon the correctness of the first and second charges asked on the part of the state, or the one given by the Court. What we decide is, that the bridging of a stream is not a condition precedent to the right of erecting a toll-gate and charging toll on a part of the road lying on one side of the stream, although it may be less than three miles in extent, where, as in this case, there are three miles or more, of the road completed.

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GRAY
v.
RICH.

The 3d and 4th instructions asked for on the part of the state, should have been given.

Per Curiam.—The appeal is sustained at the cost of the defendant.

P. S. Kennedy, for the state.

R. L. Walpole, W. Wallace and J. Coburn, for the appellee.

GRAY v. RICH.

Action, commenced before a justice of the peace, for fraud in the sale of personal property. The complaint alleges that on, &c., the defendant sold the plaintiff a mare, for which he paid him 119 dollars, by giving his note, with security, due, &c.; that the defendant fraudulently represented the mare to be only eight years old, knowing her to be ten or twelve years old; that she was not worth as much as if she had been of the age represented. It was objected to this complaint—1. That the action was prematurely brought, the note not being due, and nothing having been paid toward the price of the animal. 2. That it does not allege that the animal was of less value than the contract price. *Held*, that the complaint was sufficient in an action commenced before a justice of the peace.

Saturday,
June 19.

APPEAL from the *Rush* Court of Common Pleas.

HANNA, J.—This was an action commenced by *Gray* against *Rich* before a justice of the peace, to recover damages for an alleged fraud in the sale of personal property. Upon the failure of the defendant to appear, the plaintiff recovered a judgment for 18 dollars. The defendant appealed to the Common Pleas, and, upon his motion, that Court dismissed the case for want of a sufficient cause of action.

The complaint alleges that on the 20th of *August*, 1853, the defendant sold plaintiff a mare, for which he paid defendant 119 dollars, by giving his note, with security, due the 25th of the next *December*; that the defendant fraudulently represented the said mare to be only eight years old, knowing the same to be ten or twelve. Then follows

an allegation that the animal was not worth as much as if she had been of the age represented.

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1858.

Two objections were taken to the complaint: First, that the action was prematurely brought, even if the plaintiff could at any time maintain such suit. Nothing had been really paid toward the price of the animal; a note had been given which was not due at the time suit was brought.

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RICH.

This objection is not well taken. The plaintiff had his choice of remedies. He might affirm the contract and sue for the damage; or, if the fraud was of the character that would justify it, he might disaffirm the contract and sue for the consideration paid, &c.; or, he might wait until suit was brought for the contract price agreed to be paid, and set up his claim for the damages suffered by the fraud in the way of a defense to the recovery of the whole or a part of the price of the animal, as the proof would warrant.

The next objection to the complaint was, that it did not state that the animal was of less value than the contract price.

It is contended that an allegation that the animal, being ten years old, was of much less value than if she had been of the age represented, to-wit, eight years, is not sufficient; that if she was really, even at that more advanced age, of as much value as the contract price, no damage had resulted to the plaintiff.

The amount of damage that the plaintiff suffered was a question for the jury, and we do not think that the complaint was bad for the reason alleged, or that the plaintiff would have been confined to so narrow a scope in making his proof. If the defendant agreed to sell the plaintiff a certain article of property to be of a particular description, to-wit, eight years old, for a fixed price, the plaintiff had a right to expect it to be of that age; for it was one of those facts, where reliance must, to some considerable extent, be placed upon the representations of the owner; and if he fraudulently deceived the purchaser, as averred, he must be willing to respond in such damages as resulted. The com-

May Term, 1858. complaint was sufficient in an action commenced before a justice.

PILKINGTON *Per Curiam*.—The judgment is reversed with costs.
 A. W. Hubbard and *L. Sexton* for the appellant (1).
 N. Trusler and *J. A. Fay*, for the appellee.

(1) Counsel for the appellant cited *Denby v. Hart*, 4 Blackf. 13; *Smith v. The Trustees*, 5 id. 40; *Campbell v. Fleming*, 1 Ad. & El. 40; 2 R. S. p. 344, No. 12.

PILKINGTON v. WOODS.

If the acceptor of a bill of exchange fail to pay, and the bill be returned to the drawer, the latter may sue the former for non-payment.

The acceptance of a bill raises a presumption that the acceptor has funds of the drawer in his hands; and where a drawer makes a bill payable to a third person, it is an acknowledgement that he owes that person.

Upon the failure of an acceptor to pay, if the bill be found in the hands of the drawer with the blank indorsement of the payee upon it, the presumption is that he has discharged his debt to the payee, and that he is entitled to enforce the acceptance of the drawee.

In an action founded upon the return of a bill for non-payment by the acceptor, if the bill be shown to have been once in circulation, it will be presumed that it came back into the plaintiff's hands by payment, in the regular course by which dishonored paper goes back to the original parties, and that he holds the same in good faith; and he may recover though there be one or more indorsements in full upon it, subsequent to the one to him, and he may strike out such indorsements.

The indorsement of the payee is presumptive evidence that a bill has been in circulation.

Saturday,
June 19.

APPEAL from the *Wayne* Court of Common Pleas.

HANNA, J.—This was an action by *Woods* against the appellant. The complaint contained two paragraphs—

1. For money paid, &c.

2. As follows: "That on, &c., the plaintiff made his bill of exchange and directed the same to said defendant, a copy of which bill is herewith filed, and thereby directed the said defendant to pay to the order of *William McCord*.

in sixty days after date, at the *Citizens' Bank of Richmond*, the sum of one hundred and thirty-eight dollars, which the said defendant accepted, and promised to pay the same, yet he failed to pay the same when it became due, upon presentation at the place where payable, but the same remains wholly unpaid and due, and he avers that he took up and paid the same, wherefore he demands judgment for two hundred dollars.”

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A copy of the bill is set out, together with the acceptance and indorsement of *Mc Cord*, and also the following: “I assign this note to *A. Lashley* without recourse on myself or *William Mc Cord*. December 24, 1856. *C. J. Woods*.”

There were separate demurrers to the paragraphs of the complaint—to the first, that it was insufficient, &c.; to the second, defect of parties plaintiff, that it is insufficient, &c.

There is much confusion in the record as to the final disposition of the demurrer. The entry is, that it was sustained as to the “first and last clause of the complaint,” and overruled as to the second; that the plaintiff was required to amend, and the defendant to plead over, and each party excepted. No amendment appears to have been filed, but, thereupon, the defendant answered as follows:

1. General denial to first paragraph.
2. Partial failure of consideration to second paragraph.
3. General denial to said paragraph.
4. Generally, that the plaintiff is not the real party in interest.

To these answers there was a general denial, by way of reply, filed.

Trial by the Court, finding and judgment for the plaintiff for 143 dollars and 2 cents.

It is insisted by the appellant, that the Court erred in overruling the demurrer to the second paragraph of the complaint, as well as in the amount of the judgment, and in overruling the motion for a new trial.

The argument is, that the second paragraph is founded upon the bill of exchange, and is bad for two reasons: first, that upon the failure of the acceptor to pay, and the return of the bill to the drawer, he had no legal right to sue; and

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secondly, if he had, he transferred that right to *Lashley* by his assignment.

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A bill of exchange was made payable to the order of the drawers, and accepted by the drawees payable at a particular place. In a suit by the drawers against the survivor of the acceptors, he plead the general issue under oath. It was held that the plaintiffs could recover. *Gamble et al. v. Grimes*, 2 Ind. R. 392. See Byles on Bills, 153; *Id.* side p. 132. This appears to be the recognized doctrine in *Cal-low v. Lawrence*, 3 M. & Sel. 95; *Bartrum v. Caddy*, 9 Ad. & El. 275; 36 E. C. L. R. 138; *Hubbard v. Jackson*, 14 E. C. L. R. 241; *Beck v. Robley*, 1. H. B. 89 n; *Fentum v. Pock*, 1 E. C. L. R. 72; *Byrne v. Schwing*, 6 B. Monroe, 199; *Kemble v. Lull*, 3 McLean, 272; *Stowe v. Logan*, 9 Mass. R. 60; *Davis v. McConnell*, 3 McLean, 391.

These authorities also establish the principle, that the acceptance of a bill raises the presumption that the acceptor has funds of the drawer in his hands.

In theory, the acceptance of the bill was an acknowledgment by the acceptor that he owed the drawer, and the drawer having made the bill payable to a third person, it was an acknowledgment that he owed that person, called the payee. Upon the failure of the acceptor to pay, and the bill after maturity being in the possession of the drawer, with the blank indorsement of the payee upon it, the presumption would be that he had discharged his debt to the payee, and was entitled to enforce the acceptance of the drawee.

As to the right of *Wood* to sue in his own name, it is well settled that in actions founded on the return of a bill for non-payment by the acceptor, if it is shown that the bill was once in circulation, it will be presumed that it came back into the plaintiff's hands, by payment, in the regular course by which dishonored paper goes back to the original parties, and that he is to be regarded as holding the same in good faith, and may recover, although there may be on it one or more indorsements in full, subsequent to the one to him, which he may strike from it or not, as he may think expedient. *Dugan v. U. States*, 3 Wheat. 172, 4 Curtis,

192.—2 Greenl. Ev. § 169.—3 McLean, 392. And the indorsement by the payee is presumptive evidence that it has been in circulation.

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There was no evidence outside of the bill and indorsement, and, therefore, an absence of proof that the bill had been delivered to *Lashley*. This was necessary to complete the transfer of property in the bill. Byles on Bills, 116.—12 Ad. & El. 455.—40 E. C. L. R.

For these reasons, the right remained in *Wood* to sue.

We see no error.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

C. H. Test, N. H. Johnson and J. M. Wilson, for the appellant.

O. P. Morton and J. F. Kibbey, for the appellee.

APPLEGATE v. BOYLES.

APPEAL from the *Pulaski* Court of Common Pleas.

Saturday,
June 19.

HANNA, J.—This was an action by *Boyles* against *Applegate* for breach of a written contract.

Verdict and judgment for the plaintiff.

The first error assigned is, that the oath was not administered to the jury according to law. The statement in the record is, that “after being tried and sworn to try the issue joined,” &c.

No exception was taken to the form of the oath upon the trial, nor upon the motion for a new trial. It is too late to first raise the question in this Court. *Lindley et al. v. Kindall*, 4 Blackf. 189. See, also, *Judah v. M'Namee*, 3 *id.* 271.—*Mann v. Clifton*, *id.* 304.

The next error assigned is that the Court erred in overruling the motion for a new trial. There is nothing in this disclosed by the record, for the reason that the evidence is not in the record.

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v.
WILCOX.

The next error complained of is that "no pleadings were filed or default taken." There is an answer and reply in the record, and there was a trial of the issue thereby made.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

W. F. Lane and *E. A. Greenlee*, for the appellant.

D. D. Pratt, for the appellee.

WILCOX v. WILCOX.

Application by the husband for a divorce. Cause, abandonment. The plaintiff made affidavit of residence in this state. Notice of the suit was given by publication. The defendant made default. There was evidence of abandonment. The Court dismissed the bill, on the ground that the cause of divorce originated in the state of *New York*, where both the parties at the time resided. *Held*, that this was error.

Saturday,
June 19.

APPEAL from the *Jefferson* Circuit Court.

PERKINS, J.—Application by *Seymour C. Wilcox* for a divorce from his wife, *Elizabeth S. Wilcox*, on the ground of abandonment.

Appended to the complaint filed, was an affidavit as follows:

"*Jefferson* county, to-wit: Said *Seymour C. Wilcox*, being duly sworn deposes and says that he is at this time a *bona fide* resident of the county of *Jefferson* aforesaid.

Seymour C. Wilcox."

"Subscribed and sworn to this 1st day of *January*, 1858.

John G. Sering, Clerk."

Also, an affidavit of one *James Thompson* that the defendant, *Elizabeth S. Wilcox*, was not a resident of *Indiana*, but of *Delaware* county, *New York*.

Notice of the suit was given by publication.

The defendant made default.

The following evidence was submitted to the Court:

Alonzo B. Judd testified that he was acquainted with

the parties; that they had resided in the village of *Franklin*, *Delaware* county, *New York*, and that Mrs. *Wilcox* still resided there; that they had been reputed husband and wife, and lived together as such for several years, before and up to the time when Mrs. *Wilcox* left her husband, and returned to live with her mother; that she had then remained away from her husband about two years; Mr. *Wilcox* remained at home, in his own house, till he left, then recently, for *Indiana*. Mrs. *Wilcox* told him she never would again live with her husband—did not know why she would not.

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v.
WILCOX.

Myron Wilcox was present at the marriage of Mr. and Mrs. *Wilcox*, on the 16th of *May*, 1853. They lived together as man and wife till *May*, 1856, when Mrs. *Wilcox* abandoned her husband, and returned to her mother. She left of her own accord, saying she could be more happy with her mother, and would never return to her husband. She left in the day time, having procured a wagon, &c., into which she had placed all the articles she took to her husband's house, at marriage. The articles were taken to her mother's.

Thereupon the Court dismissed the bill, "on the ground that the cause of divorce originated in the state of *New York*, where both the parties at the time resided, to which opinion the plaintiff excepted, &c. There was a motion for a new trial overruled.

The Court erred in dismissing the bill for the reason assigned. *Tolen v. Tolen*, 2 Blackf. 407. This case is supported by modern authorities. Bishop on Marriage and Divorce, § 727, *et seq.*, where the subject is examined.

Per Curiam.—The judgment is reversed, with instructions to the Court below to grant the divorce.

M. G. Bright, for the appellant (1).

(1) Mr. *Bright* cited *Tolen v. Tolen*, 2 Blackf. 407; *Tovey v. Lindsay*, 1 Dow. 117; *Utterton v. Tewsh*, 2 Kent's Com. 110 [Fergusson's Reports of the Consistorial Courts of *Scotland* in actions of divorce, p. 23]; *Duntze v. Levett*, *id.* 112 [Fergusson, 68]; *Edmondstone v. Lockhart*, *id.* 113 [Fergusson, 168]; *Butler v. Forbes*, *Ibid.* [Fergusson, 209]; *Kibblewhite v. Rowland*, *Ibid.* [Fergusson, 226]; *Gordon v. Pye*, *id.* 114 [Fergusson, 276]; *Harding v. Allen*, 9 Greenl. R. 140.

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SWAIN *v.* BUSSELL and Others.

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SWAIN
v.
BUSSELL.

Schemes for the division of property to be determined by chance, are prohibited by law.

Suit to annul and set aside a deed. The consideration of the deed was 1,533 shares in a lottery, or division of property to be determined by chance. The complaint states that the deed was made to the owner and manager of the scheme; but it also shows that the plaintiff was himself a shareholder and participant in the scheme, with notice of its terms and illegal character. *Held*, that he is not in a position to ask the aid of the Courts in this form of action; that he cannot avoid his own act because of fraud and illegality connected with it, in which he shows himself to have been a participant.

Saturday,
June 19.

APPEAL from the *Rush* Circuit Court.

HANNA, J.—*Swain*, on the 4th of *February*, 1856, filed his complaint alleging that on the 2d day of *February*, 1855, he sold and conveyed to *Bussell* certain real estate, in consideration of the transfer to him by said *Bussell* of 1,533 shares in what was known as the “*Shelbyville Real Estate Company*,” that said deed was so made upon the representations and conditions contained in a circular in said complaint set forth, and upon the express condition that said *Bussell* should truly perform said conditions; that *Bussell* represented that said company was not a scheme for the division of property by chance—was not a lottery—but an honest transaction; that the lands described in the circular were choice, and the titles good; and that on the 15th of *May*, 1855, they should be distributed among the owners of the shares fairly, and that afterwards he would make to each one a good deed for the lands awarded him.

But he avers that the said *Bussell* was the sole owner of said scheme; that it was for the division of the lands mentioned, by chance, and the said shares sold him were shares therein; that *Bussell's* representations were false and intended to defraud, &c.; that *Bussell* did not own, nor could he make title to the same; that the whole scheme and plan set forth in the circular was abandoned, &c., and, therefore, the conditions of said sale were never performed; that the consideration was illegal, and said deed obtained by fraud; that afterwards each of the other defendants purchased of

Bussell with full notice, and have not yet paid the purchase-money to him.

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v.
BUSSELL.

The circular referred to states that there would be, on the 15th of *May*, 1855, at *Shelbyville, Indiana*, a sale by the said company of choice lands, to the amount of 150,000 dollars; that upon this amount of stock they have issued 50,000 shares, which they would sell at three dollars each, and would distribute, at the time and place stated, all of said property amongst the shareholders, severally, as may be determined by the numbers on their certificates, under the management of a board of responsible gentlemen. Then follows a list of the property, described in the circular as a list of prizes, in which is described this land in dispute, as the "*Swain Mills on Flat-Rock, Rush county, Indiana*, together with 40 acres of land, and a first class saw-mill attached," and the value set out at 7,200 dollars. It is alleged that the title to all of said lands is good, &c., and that proper conveyances will be made to the lucky owners, immediately after the drawing; that the number of prizes is 3,329, which gives one chance in 15 to draw—perhaps—a fortune. Then follows a puff of Dr. *Bussell*, a statement that he is fully empowered by his colleagues to manage the scheme as may best suit their interest, &c., and an offer of a large per cent. to agents to engage in the sale of shares.

The plaintiff asks that the deed to *Bussell* be annulled and set aside, and, also, from him to the other defendants.

To this complaint the defendants, other than said *Bussell*, filed a demurrer, which was by the Court sustained. Upon this, the question is presented for our consideration.

The first point presented is, whether this transaction was illegal, and one that was prohibited by law.

Without doubt, the whole scheme was an illegal, prohibited, proceeding; and the allegations in the complaint that the defendant verbally represented to the plaintiff that such was not its character, are of no avail against the statements and contents of the printed circular, which is made a part of the complaint, and upon the representations and promises whereof plaintiff avers he made the deed. The

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scheme was one of the forms of a lottery, whereby several persons might place their property in a common fund, representing such sums as the parties should agree upon, and thereupon issuing and selling to the unwary and the credulous, tickets representing shares in said scheme. These tickets might thus issue to the real value, or twice, or thrice, or any number of times, the real value, of the property—depending upon the partial honesty, or the total dishonesty of the managers of such scheme. In a word, such schemes for the division of property to be determined by chance, are prohibited by law. 2 R. S. p. 437.—State Constitution, 1 *id.* 69.

The statute is that, “If any person shall sell any lottery tickets, or share in any lottery, or scheme for the division of property to be determined by chance, or shall make or draw any lottery, or scheme for a division of property, not authorized by law, such person on conviction shall be fined not exceeding five hundred dollars.”

The constitutional provision is, that “No lottery shall be authorized; nor shall the sale of lottery tickets be allowed.”

That the managers of the concern believed it to be a violation of the constitution and the law, is manifest from a clause in their circular, as follows: “Those who desire to operate in this enterprise without incurring any risk from law, or violating any oath of office, can do so by forming clubs and ordering the shares through the mail; we have already sold 13,000 shares in this way.”

The following cases are cited from decisions of our sister states, and it is believed correspond with our view of this case as expressed above:

The case of *The State v. Clark*, 2 Fogg, 33 New Hamp. R. 334, was an indictment for unlawfully disposing of one ring by lottery, and was founded upon the following statute: “If any person shall make or put up any lottery, or shall dispose of any estate, real or personal, by lottery, he shall be fined,” &c. The facts were, that one *Flanders* bought of defendants a book for 1 dollar, which was worth less than that sum, on the back of which was a written

number, which number was then compared with certain numbers and entries in a book of defendants; and he was informed that he was entitled to a gold ring worth three dollars, which was delivered to him. He was induced to make the purchase from seeing a handbill headed "gift-book sale."

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The defendants were convicted, and the Supreme Court held the finding right; and they say "that where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery," &c.

In *Den ex dem. Wooden v. Shotwell*, said *Wooden* had divided a parcel of land into fifty-eight lots of unequal value, from 50 dollars to 600 dollars per lot, and disposed of them at 75 dollars each; and the particular lot of land to which each person was to receive a title was determined by lot. The Supreme Court of *New Jersey* say this was, both in substance and in form, a lottery. 3 *Zabriskie*, 470. See, also, *Thorn and Cory v. Wooden*, 2 *id.* —; 4 *Wash. C. C.* 129; 4 *Serg. & R.* 151.

The People v. The American Art Union, 13 *Barbour, S. C.* 577, was a proceeding against the *Art Union* upon substantially the following state of facts: Persons became subscribers at a fixed price. The society purchased works of art, and once each year each work was numbered and the number placed in a box. The name of every member of the association was also placed in a similar box. A number was then drawn from the box, and a name drawn from the other box, and the person whose name was drawn was to be the owner of the work represented by the number just drawn. This was declared to be a lottery—a mode of distribution illegal and unconstitutional. The constitutional provision is very similar to ours; it is as follows: "No lottery shall hereafter be authorized, or any sale of lottery tickets allowed within this state." This case was afterwards taken to the Court of Appeals, and in *October*, 1852, that Court decided that it was a scheme having all the attributes and elements of a lottery; that it

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was a kind of game of hazzard, wherein several lots of merchandise are deposited in prizes for the advantage of the fortunate (Rees's Cyclopedia); that it is a game of hazzard, &c. (12 Brewster's Ed. Encyclopedia, 258); that it was prohibited by the constitution. The judgment of the Supreme Court was affirmed. 3 Selden, 235.

In *Thatcher v. Morris*, the Court of Appeals of *New York* held, that in a suit upon lottery tickets to recover the prize drawn by such tickets in a *Maryland* lottery, the plaintiff must show on the face of his complaint that his title was acquired—his contract made—in a jurisdiction where, gambling was authorized by law; because such tickets were a part of the machinery for carrying on a business prohibited by law. 1 Kernan, 438. In the same case, it is stated to be conceded that such a contract is immoral, and that no right of action can accrue to a party by reason of such contracts and dealings. *Id.* 438, 439.

But it is argued that the purchase of lottery tickets is not an illegal or immoral transaction, and *Swain* was not acting in violation of law although *Bussell* might have been; and therefore, Courts of law will aid *Swain* to amend the executed contract, when such aid would not be extended to *Bussell* to compel the performance of the contract if it had not been executed. This reasoning is unsound. It was evidently the intention of the framers of our fundamental law, and our statute, to discountenance and, as far as possible, suppress gambling in all its forms, one of the most seductive phases of which is presented in the guise of lottery schemes and chance distributions of property. If the plaintiff, with the facts before him, saw proper to become a participant in such an illegal and prohibited transaction—a transaction not only in violation of the statute and the constitutional prohibition, but evidently, from the view taken of it by our law-makers, in contravention of public policy as understood by them, he is not in a condition to ask, in this form, the aid of a Court of justice to relieve him from the superior skill of his associate. Such combinations were viewed by our legislators as formed to deceive and defraud the public. And if one of the associ-

ates should, by his greater disregard of right, succeed in defrauding his fellows, Courts are not open to administer relief to them in the manner here sought, because of their participation in those acts so much at war with public policy. The plaintiff, in the case at bar, does not stand in Court as a mere purchaser of tickets in this scheme. By his own showing he received 1,533 shares, of the conventional value of 4,000 dollars, as the consideration for his land; and at the same time he had before him a circular in which the land was held up to the public as of the value of 7,200 dollars, or 3,200 dollars more than he received therefor. The real value of the property he nowhere alleges. Nor is it clearly shown whether it was the intention of the associates in this scheme to really dispose of their property at exorbitant prices, or whether they retained in their own hands a majority of the chances, and thus intended to absorb the property, and fleece the public out of the amount for which tickets were in fact sold. Be that as it may, there was, it is clear, an arrangement to violate the law and contravene sound public policy. This is shown by a fair legal interpretation of the circular made a part of the complaint.

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The decisions are not uniform upon the subject of lotteries, either upon the morality or immorality thereof, or of the legal rights of parties directly or indirectly engaged therein.

Several cases are cited by counsel, some of which will be noticed.

In the case in 3 Zabriskie, heretofore cited, it is held as undisputed law, that "when money or other personal property is paid by one of two parties to an illegal contract to the other, where both may be considered as *particeps criminis*, an action cannot be maintained, after the contract is executed, to recover the money. So money lost by illegal gaming cannot be recovered, except when specially authorized by statute." See Broom's Legal Maxims, 325. In the case cited, the opinion does not intimate that a different rule prevails in reference to the recovery of real estate, in such instances, except in this, that the plaintiff had the

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right in that case to recover because of his previous untainted title to the land in dispute, and to which alone he appealed on the trial, and against which title the defendant could not set up, nor the Court give legal effect and validity to, a deed which the statute of that state declared invalid and void. That statute was as follows: "That every grant, bargain, sale, conveyance, or transfer of any goods, chattels, lands, tenements, hereditaments, or real estate, which shall be made in pursuance of any such lottery, is hereby declared to be invalid and void." We have no such statute in this state.

The *Lessee of Bond v. Swearingen*, 1 Ohio R. 403, cited by the appellant, appears, also, to have been governed by the territorial statute in force at the time the deed, founded on a gambling consideration forbidden by that statute, was made. The effect of that decision is, that the deed was void as against creditors; and indeed, if there had been no creditors, that the title to the land would, in pursuance of that statute, have been vested in the heirs of the grantor, instead of passing by the deed to the grantee therein named.

Lee and *Mullikin* executed their bond to *Bruce*, binding themselves, &c., founded upon the consideration that the latter would withdraw his opposition to one *Elliott's* obtaining a discharge under the insolvent act. It was held that the consideration of the bond was illegal, and that the suit could not be maintained. 4 Johns. 412.—2 *id.* 386.

In an action by the managers of a lottery against a defaulting agent for the sale of tickets, to recover the price of the tickets delivered to him, it was held, among other things that, "whenever from the plaintiff's own showing, or otherwise, the cause of action appears to arise from the transgression of a positive law of the country, he has no right to be assisted,"—and that the action could not be sustained. 5 Johns. 327.

In the case of *The Inhabitants, &c. v. Eaton*, 11 Mass. R. 368, which was a suit brought to recover certain real property transferred by deed as a composition of a felony, it was held that where two parties agree in violating the laws of the land, the Court will not entertain the claim of either

party against the other, for the fruits of such unlawful bargain. If a party has foolishly paid his money, repents his folly and brings his action to recover it back, the law will say to him: You have paid the price of your wickedness, and you must not have the aid of the law, to rid you of an inconvenience, which is a suitable punishment for your offense; and that no distinction exists between the payment of money, and a conveyance of land upon such a consideration.

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Burger sued *Rice* on a contract by which *Rice* agreed to let *Burger* have the keeping of one-half of the paupers of *Floyd* county, the keeping of whom had been awarded to *Rice*. *Burger* had partly performed and offered to complete the performance of his part of the contract. The Court instructed the jury that such contract was illegal as against public policy; and that "the law will neither enforce such a contract, nor relieve a party from loss by having in part performed it." The finding was for the defendant, and was affirmed in this Court. 3 Ind. R. 127.

In a suit upon a promissory note, the consideration of which was the loan of individual small bills, the issue of which for circulation was prohibited by statute, the defendant had judgment because of the illegality of the consideration. *Madison, &c., Co. v. Forsythe*, 2 Ind. R. 484.

Catts v. Phalen et al., was a suit by the appellees to recover 12,500 dollars, money had and received to their use. *Catts* had been employed by the plaintiffs to do the manual acts necessary, &c., in drawing the numbers of a lottery of which they were managers. He fraudulently pretended that a certain ticket had drawn 15,000 dollars, which ticket he secretly owned. The plaintiffs paid the money to the person who acted for *Catts, &c.* The suit was to recover it. It was held that the illegality of the lottery was not a defense to the action. 2 Howard (U. S.), 376, 15 Curtis, 142.

In *Watts v. Brookes*, it was said by the chancellor that he could "not allow it to be argued that you can break a law covertly. What you cannot do openly you cannot do

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secretly. A man cannot set up an illegal act of his own in order to avoid his own deed." 3 Vesey's Ch. 612.

It is thought that the case in 3 Zabriskie, and that in 2 Howard, should weigh much in favor of the position of the appellant. It is not necessary now to determine whether the decision in *New Jersey* might not have been influenced by the statute of that state, nor to critically examine the reasoning resorted to, and the conclusion arrived at; nor need we decide whether, in our opinion, it is supported by, or is adverse to, the weight of authorities; for it is by that Court placed upon the ground that the plaintiff did not base his claim upon the illegal transaction, and the defendant did attempt to sustain his defense by virtue of it.

Without stopping to carefully consider the reasoning of the case in 2 Howard, we might say that the facts upon which that opinion was pronounced differed widely from those in this case. In that, the plaintiffs had acted merely as managers of a lottery, supposed to be authorized by law, for the benefit of a public work; and if any recovery which might be had by them would be for the benefit of that work, and would not redound to their individual interest, then their position was very different from that of the plaintiff in this case; for he seeks to annul his own act, because of the fraud and illegality that was connected with it, and in which he shows he participated, and that he may individually be benefited thereby. This we do not think he is in a position to ask the Court, in this form of action, to do for him, and the demurrer was, therefore, properly sustained.

Per Curiam.—The judgment is affirmed with costs.

A. W. Hubbard, L. Sexton and P. A. Hackleman, for the appellant (1).

J. S. Scobey and W. Cumbach, for the appellees (2):

(1) Counsel for the appellant argued as follows:

The judgment of the Court was that the complaint did not state sufficient facts to constitute a cause of action; but the real ground upon which the Court sustained the demurrer was, that the contract was so tainted with immorality that the Court could not afford relief. We think the decision of the Circuit Court is erroneous under any view of the case. Lotteries are not *mala in se*.

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It is not contrary to the law to buy lottery tickets. In some of the states lotteries are sanctioned and upheld by statutory provisions. There is not an equal degree of criminality, therefore; and the reason why Courts have in some instances refused to interfere to relieve against immoral contracts, does not apply. Besides, the complaint expressly alleges that *Bussell* represented to the plaintiff that the *Real Estate Company* was not a scheme for the division of property by chance; that it was not a lottery, but an honest and legal transaction. These statements of *Bussell* are important. He was the manager of the concern, and the plaintiff had a right to presume that he had a better knowledge of the facts than any other person. Whether it was a lottery, or a scheme for the division of property by chance, was a question of fact peculiarly within his knowledge; and if his statements were untrue, they were a fraud upon the plaintiff. The maxim, *In pari delicto potior est conditio defendentis*, does not apply; for on the part of the plaintiff there was no criminality—the act so far as he was concerned being neither illegal nor immoral. If *Bussell's* statements were false, he obtained the deed by fraud, and the contract can be avoided by the plaintiff; and he is entitled to the aid of the proper Court in obtaining relief. To deny this, would be to punish the innocent and reward the guilty. Where both parties are truly in *pari delicto*, relief will not be granted, unless in cases where public policy would thereby be promoted. 1 Stor. Eq. § 298. But where one of the parties does not concur in the illegal act, and is not in *delicto*, the Courts will grant relief, if the circumstances are such as to warrant their interposition. 1 Stor. Eq. § 300.

The complaint shows that the deed was obtained by fraud, misrepresentation and deceit, and for a consideration which was illegal, so far as *Bussell* was concerned. Under such circumstances, we maintain that the deed is absolutely void. Hilliard on Real Estate, at page 408, says: "It is said that by the common law, a deed contrary to the provisions of a general statute, or made for unlawful purposes, or to carry into effect a contract unlawful in itself, or made so by a prohibitory statute, is void *ab initio*." See, also, to the same effect, 1 Ohio R. 403; *Phelps v. Decker*, 10 Mass. R. 267. It is said in 2 Greenleaf's Cruise on Real Property (4th volume of original), marginal page 24, in speaking of considerations to support deeds—"But considerations which are against the policy of the law, the principles of justice, or the rules of morality, are utterly void; it being a rule both of law and equity that *ex turpi contractu actio non oritur*." Chancellor KENT says, in the 4th volume of his Commentaries, page 464—"It is a universal rule, that it is unlawful to contract to do that which it is unlawful to do; and every deed and every contract are equally void, whether they be made in violation of a law which is *malum in se* or only *malum prohibitum*." But it is insisted that the parties are in *pari delicto*, and that these rules do not therefore apply to the case under consideration. We have already shown that this is a mistake. The plaintiff was guilty of no offense in purchasing the shares in the *Real Estate Company*; and the complaint predicates his claim to relief expressly on the ground that the deed was obtained by fraud and misrepresentation; that it is absolutely void; and that the illegal consideration on the part of *Bussell*, and in which the plaintiff was not implicated, was entirely abandoned and never carried out. If a vendee be guilty of actual fraud in procuring a title to land, no title passes to him, whether the sale be private or judicial. The sale is absolutely void to all intents and purposes. *Sands v. Codwise*, 4 Johns. 536, 598.—*Gilbert v. Hoffman*, 2 Watts, 66. A

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void deed or contract cannot be affirmed. 5 Ind. R. 353. If the deed is absolutely void, is not the plaintiff entitled to the aid of a Court of equity to remove or set it aside? We think there can be no doubt on this point. See Stor. Eq.

The consideration was not immoral. It was not *malum in se*. The sale of lottery tickets is sanctioned by law in some of the states. It was only *malum prohibitum* so far as *Bussell* was concerned. So far as *Swain* was concerned, his purchase was neither immoral nor illegal, as before stated. The authorities all concur in stating that there is a distinction between contracts which are immoral and criminal, and such as are simply illegal and void. Courts will aid, in the latter class of cases, but not in the former. 7 Johns. 440.—11 id. 30.—5 id. 334.—If the parties to a contract cannot compel its performance, the law imposes a disability to contract. 16 Johns. 468.—Same, 486. If disabled to contract, the deed is void, and the parties are entitled to the aid of the proper Court to place them *in statu quo*.

The complaint shows that the scheme for the division of property by chance was abandoned. Even if the parties, therefore, were *in pari delicto*, the illegal purpose having been abandoned, and the deed left without any consideration whatever, the plaintiff is entitled to the relief demanded. *Bussell* holds the property in trust for *Swain*. Hill on Trustees, 108, 109, 110. A deed made to hinder or delay the vendor's creditors, is illegal and void as to creditors. But as between vendor and vendee it is binding. But the rigor of this rule is about being removed by the Courts, and very properly, we think. Where the grantor pays his debts and washes his hands of the fraud, may he not recover back his property from the vendee? Public policy demands that the Courts should aid him in returning to the paths of rectitude and honesty. The reasoning of this Court in the case of *Laney v. Laney*, 4 Ind. R. 152, and the authorities there cited, are conclusive, we insist, upon this point, and ought to be adopted. In this case the scheme for the division of property having been abandoned, and the shares received in consideration for the deed being valueless, is not the plaintiff entitled to relief? The illegal consideration no longer exists, the illegal purpose was abandoned, and should not the Courts favor the restoration of the parties to their just rights, under these circumstances? But really, the complaint shows that the deed was delivered upon a condition subsequent, which has never been performed. But suppose the scheme had been carried out, could not *Swain* recover back the price paid for the shares in it? No obligation can be created in the sale of tickets in a private lottery. *Clarke v. Havens*, 1 A. K. Marsh. 198. A bond given for the sale of tickets in an unauthorized lottery is void. *Morton v. Fletcher*, 2 A. K. Marsh. 137. Money paid on notes given for the purchase of tickets in a lottery unauthorized by law, may be recovered back. *Gray v. Marsh*, 2 A. K. Marsh. 208. If money paid for lottery tickets, or shares in a scheme for the division of property by chance, may be recovered back, and we have no doubt of it, may not land or other property given in exchange for them, be? We can see no reason why there should be any distinction between money paid and property delivered. There can be none, as there is no reason for any.

The scheme of *Bussell* was a gigantic fraud. He represented it to be a legal and honest transaction. He literally swindled the plaintiff out of his property; and yet we are told he can have no redress in the Courts of the country; that he stands *in pari delicto*, and must submit to the fleecing. The complaint and

the exhibits filed with it, and which are made a part of the record in the case, constitute the only sources of information as to the facts, as the case stands before the Court. These are admitted by the demurrer. Take the facts as stated—the fraud, the abandonment of the illegal consideration, the non-fulfillment of the conditions subsequent, the misrepresentations and deceit, and the innocence of the plaintiff—and do they not entitle the plaintiff to relief? Will not proof of the facts sustain the case, and authorize a decree setting aside the deed? This is the real touchstone of the sufficiency of the complaint.

The authorities cited by the defendants in the Circuit Court in support of their demurrer, we thought, and still think, were inapplicable. They all related to the considerations or undertakings which were clearly *mala in se*, and to cases where the maxim, *In pari delicto potior est conditio defendentis* was clearly applicable. We think no authority can be cited which will deny the plaintiff's right to relief on such a state of facts as is contained in the complaint in this case. As the facts are admitted by the demurrer, the only point for this Court to decide is, whether they are sufficient to authorize the plaintiff to maintain the action.

That Courts and legislatures are inclined to favor the views above presented, is apparent, not only from the decisions to which we have referred, and others of like effect, but from the tendency of legislation in this country. Courts of equity, if a borrower has paid the money on a usurious contract, will assist him to recover back the excess paid beyond principal and legal interest. 1 Stor. Eq. § 302. Our own legislature has authorized a person who loses money by gaming to recover it back from the winner. 1 R. S. p. 305. Indeed, we think this might be done without any statutory provision on the subject. Public policy demands that gaming and lotteries and schemes for the division of property by chance, should be broken up, and the best method to secure this desirable result is, for Courts to treat all contracts relating to either, or growing out of them, as void, and to lend their assistance to place the parties in *statu quo*. Our statute in regard to lotteries and schemes for the division of property by chance, fixes the criminality entirely upon the vendor of the tickets. 2 R. S. p. 437, § 32.

(2) The following was the argument of counsel for the appellee:

We present, mainly, but one question in the case. This being a lottery case, (which we think clearly appears, and was in the Court below admitted and agreed,) can Swain, the grantor of the land, on such a consideration, maintain a suit to cancel his deed and recover the premises?

Lotteries are prohibited in *Indiana*. See Constitution, art. 15, § 8; 2 R. S. p. 437, § 32. This section goes to lotteries proper, and to "schemes for the division of property to be determined by chance." This contract, we claim, is within the maxim of the law, "*Ex turpi contractu, non oritur actio*," and that the plaintiff, being the grantor of the land, is strictly within the operation of this maxim.

But we have numerous adjudicated cases, to which we confidently refer the Court. And we shall not notice these cases at any length, regarding it as a work of supererogation to do so. But we shall content ourselves with stating what seems to be the doctrine established by them, and leave to the Court to see, on an examination of the cases cited, whether they do not maintain it. That doctrine is this: That in all contracts which are immoral, or against

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public policy, or against a statutory enactment, the parties being in *pari delicto*, the maxim "*potior est conditio defendentis*" applies, and no action is maintainable. *White v. Franklin Bank*, 22 Pick. 181.—*Inhabitants, &c. v. Eaton*, 11 Mass. R. 368.—*Bartle v. Nutt, Admr. &c.*, 4 Peters, 184.—*Hunt v. Knickerbocker*, 5 Johns. 327.—*Bruce v. Lee et al.*, 4 id. 411.—*Bunn v. Riker*, 4 id. 226.—*Doolin v. Ward*, 6 id. 194.—*Wilbur v. How*, 8 id. 444.—*Thomson v. Davies*, 13 id. 112.—*Utica Ins. Co. v. Kip*, 8 Cowen, 20.—*McCullum v. Gourlay*, 8 Johns. 147.—*Mount et al v. Waite et al.* 7 id. 434.—1 Story's Eq. 399, § 371.—*Id.* 314, §§ 296 to 298.—2 Pars. Cont. 252.

Cases may be cited by counsel on the other side, where these actions have been sustained; but it will be seen in those cases, that a distinction is taken, on the ground that the parties are not really in *pari delicto*, and therefore the action is maintained. So in usury cases, where the usury paid is recovered back. The Courts in these cases say that there is oppression and extortion on the one side—that the parties are not in *pari delicto* for that reason. So it has been held in one case, that where a seducer had given his bond to smother a prosecution against him, it should be held binding against him, as it appeared he had taken advantage of the female in the case. The parties were therefore not in *pari delicto*. This same question is discussed, also, in the case in 11 Mass. R., cited *supra*, at page 376.

Since preparing the foregoing, we have been shown a copy of the appellant's brief, and we notice some of its points.

"It is not contrary to the law to buy lottery tickets." In answer to this we quote the constitution again. Section 8, art. 15, says: "No lottery shall be authorized; nor shall the sale of lottery tickets be allowed." Suppose the latter clause of this section read—"nor shall the purchase of lottery tickets be allowed;" would the sense or spirit of it be at all changed? Certainly not. In other words, where the sale is prohibited, is not this prohibition upon the vendor and vendee alike?

But the appellant, fearing that the Court might doubt his dictum, proceeds to state that, "in some of the states lotteries are sanctioned and upheld by statutory provisions." That may be and no doubt is true. In one of the territories of this country, polygamy is so upheld. We do not suppose that this would be an answer to a charge of polygamy here.

* * * * *

The appellant urges that the modern doctrine is, to allow relief to be granted in these cases, where by the older cases, it would have been denied. Exactly the reverse of this we understand to be the case. This subject has been discussed in 1 Story's Eq., §§ 296 to 306. In § 298, he says: "In general, (for it is not universally true,) where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita*, or *mala in se*, Courts of equity following the rule of law, as to participators in a common crime, will not, at present, interpose to grant any relief; acting upon the known maxim, in *pari delicto*," &c. In a note to this text, the author further says:

"I say *at present*; for there has been considerable fluctuation of opinion, both in Courts of law and equity, on this subject. The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more

severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief, and no countenance to claims of this sort."

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This note is supported by a long list of authorities at law and in chancery, to which this Court is referred. And again in the same section, 268, it is further said that "the suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check, naturally connected by a want of confidence, and a sole reliance upon personal honor. And so, accordingly, the modern doctrine is established." With this we are willing to rest, as to what is the modern doctrine in the question under consideration, and also as to what public policy is in regard to the same matter.

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We agree with the counsel for the appellant, that "public policy demands that gaming and lotteries and schemes for the division of property by chance, should be broken up;" but we wholly dissent from their conclusion as to the best mode of doing this. They say, "give assistance to place the parties in *statu quo*." We think not, and we offer the reasoning of Justice STORY, and the authorities cited by him, as well as all the authorities cited by us, in support of our view.

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The simple fact that a party was surprised by the testimony of one or all of his witnesses, or at the result of the trial of his cause, is not a sufficient ground for granting him a new trial.

So, the fact that a party has discovered new evidence, will not secure him a new trial, unless he show that he used due diligence to obtain that evidence before the trial which has been had.

Such diligence cannot be inferred, when the party alleges surprise at the testimony of his other witnesses.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Saturday, June 19.*

PERKINS, J.—Suit to recover possession of personal property. Answer, that the property did not belong to the plaintiff, but to others, and claiming a return of the property. Issue by replication. Trial by jury; verdict for the defendant, assessing his damages at 100 dollars, and awarding him a return of the property. The verdict did not find the value of the property.

The Court refused a new trial, and that ruling of the

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Court is the only error complained of. The grounds taken by the plaintiff for a new trial were four—

1. Surprise at the testimony of one of his witnesses.
2. Excessive damages.
3. That the verdict was contrary to law and evidence.
4. Newly discovered evidence.

The first and fourth causes may be noticed together. Separately, they amount, in this case, to nothing. The simple fact that a party was surprised by the testimony of one, or all, of his witnesses, or at the result of the trial of his cause, is not a sufficient ground to give him permission to retry it. So, the fact that a party has discovered new evidence will not secure him a new trial, unless he shows what diligence he had used, and that it amounted to due diligence, to obtain that evidence before the trial which had taken place.

Combined, we do not think the two causes sustained the motion on the ground of surprise. The party says he was surprised by the testimony of one of his witnesses. He does not say that that witness will testify differently upon another trial, nor that he had used any diligence to ascertain what would be his testimony on the one had. Now it appears, from the affidavit of newly discovered testimony, that evidence could have been obtained to meet the plaintiff's case. Yet, he had not used diligence enough even to ascertain what the witnesses summoned would testify to; much less, as to the obtaining of additional ones, should those prove insufficient. In such a state of facts, we think the plaintiff's surprise must be attributed to his own negligence.

The verdict and damages were based upon the evidence, and instructions of the Court given to the jury, to which no exceptions were taken at the time, nor are there now. They do not seem to authorize interference on the part of this Court.

It is objected in this Court that the jury did not find the value of the property claimed in the suit, and of which a return was awarded. If the omission to thus find was an

error in this case, it could have been at once corrected, had the objection been made below, when the verdict was returned. *Noble v. Epperly*, 6 Ind. R. 468. This Court does not know but that the property involved was in a situation to be, and has been returned.

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It is too late to raise the point for the first time here.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

S. W. Telford and *T. Dame*, for the appellant.

W. F. Lane and *E. A. Greenlee*, for the appellee.

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Section 105, 2 R. S. p. 375, providing that where two or more defendants are indicted jointly, any defendant requiring it must be tried separately, does not extend to prosecutions by information.

APPEAL from the *Bartholomew* Court of Common Pleas. Saturday,
June 19.

PERKINS, J.—Information against *Lawrence* and two others, for creating and continuing a nuisance, by placing and leaving “the carcass of a dead mare near a certain public highway, where all citizens were wont to pass, &c., which carcass decayed and became offensive,” &c.

The defendants appeared and severally demanded a separate trial. The Court refused the demand; the defendants were tried jointly; two were acquitted, and one convicted and fined.

It is assigned for error that the Court erred in refusing separate trials. The record shows nothing touching the point except the facts we have recited.

At common law, separate trials in such cases were in the discretion of the Court; and that discretion was presumed, the contrary not appearing, by the superior Court, to have been rightly exercised. But our statute (2 R. S. p. 375, § 105) enacts that where “two or more defendants

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are indicted jointly, any defendant requiring it, must be tried separately."

The question is, were the defendants in this case indicted? They were prosecuted in the Common Pleas by information, for a misdemeanor. Prosecutions in the Common Pleas are not by indictment. It is only felonies that are thus prosecuted, in the Circuit Court, upon bills found by a grand jury.

We think the statute quoted should not, by construction, be extended to prosecutions by information.

Per Curiam.—The judgment is affirmed with costs.

W. Herod and S. Stansifer, for the appellant.

THIEBAND, Guardian, v. SEBASTIAN, Administrator.

A testator by his will, made at the city of *Paris, France*, after directing the payment of debts, funeral expenses and certain legacies, and bequeathing the annual income of the residue of his estate to his wife during her life, divided the estate, which was all personalty, into six parts, one of which he devised to his brother during his life, and upon his death, the same sixth part was to be divided equally between his children then born. The brother died before the testator, leaving three children. *Held*, that upon the death of the testator, the estate vested, *eo instanti*, in the children, though not to be distributed till the death of the testator's wife.

The legatee and his children were residents of this state at their several deaths.

Held, that at the death of the legatee without a will, the estate passed to his heirs under the laws of this state,—the succession to personal property being governed by the law of the domicile of the intestate.

Where the Court authorized a deposition to be taken in *Switzerland*, and ordered it to be certified as depositions taken in this state are certified:—*Held*, that a certificate failing to show that the deponent was duly sworn—by whom the deposition was written—and whether or not the adverse party attended—was not sufficient.

By § 36, 2 R. S. p. 317, a foreign will, or a copy and probate thereof, cannot be used in evidence in the Courts of this state, unless it has been first produced to the Common Pleas, and by that Court directed to be filed and recorded.

Saturday,
June 19.

APPEAL from the *Switzerland* Circuit Court.

DAVISON, J.—The material facts of this case are these:

Daniel F. Courvoisier, having made his will, died testate at *Paris*, in *France*, on the 15th of *June*, 1832. The city of *Paris* was his domicile. His will directs the payment of debts, funeral expenses, and certain legacies; bequeaths the annual income of the residue of all his effects to his wife, *Julia M. Courvoisier*, during her life; divides the estate, which was all personalty, into six parts; and then (so far as its provisions relate to questions arising in the record) proceeds as follows: "I give one-sixth part of my estate to my brother, *David L. Courvoisier*, during his life. After his death, it is my wish that the same sixth part of the residue of my estate may be divided in equal portions between all his children born at that date, whatever may be their number."

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David L. Courvoisier, the legatee named in the will, at his death, which occurred before that of the testator, left three children, *Frederick*, *Lewis* and *Benoit*. *Frederick* is still living. *Lewis* died without wife or issue or their descendants. *Benoit* died in 1832 or 1833, leaving two children, viz., *Frederick Louis* and *Louisa Henrietta*. The latter was married first to one *O'Neal*, by whom she had one child, *Frederick B. O'Neal*, who is the ward of *Thieband*, the appellant. After *O'Neal's* death, *Louisa* married *Sebastian*, the appellee. The testator's wife died in the year 1848. And *Louisa* died in *March*, 1852, without issue by *Sebastian*, her second husband, but leaving *Frederick B. O'Neal*, her only child, then of the age of four years. "On the 20th of *March*, 1849, and before *Louisa's* death, one *Auguste Delachaux* was appointed by the justices of the peace in *Poutz*, *Switzerland*, attorney for *Benoit* and *Frederick Courvoisier*, and in that capacity received the distributive shares of each. It would seem that the death of *Benoit* was then unknown to the justices at *Poutz*. The amount received for *Benoit* was 2,300 dollars, one half of which was paid over by *Delachaux* to *Thieband*, as guardian of *Frederick B. O'Neal*. *David L. Courvoisier*, the father of *Benoit Courvoisier*, *Benoit* himself, and his daughter, *Louisa Henrietta*, the mother of *O'Neal*, were all, at their several deaths, domiciled in this state. The present

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suit was instituted by *Sebastian*, as administrator of his deceased wife, to recover the money paid to *Thieband* as guardian, &c. There was a verdict for the plaintiff, upon which the Court, over a motion for a new trial, rendered judgment.

It is insisted that the right to the money in controversy is to be settled by the law of the domicile of the testator at the time of his death, and not by the statute law of *Indiana* regulating distribution, &c. This position seems to be incorrect. The words *his children*, as used in the will, simply comprehend the children of *David L. Courvoisier*, and not his grandchildren; hence, the will does not confer title on either party to this suit, because neither of them is designated as legatee. And the inquiry at once arises, whether the one-sixth of the estate bequeathed to *David L.* during his life, and after his death, to his children, vested in them upon the decease of the testator. If it did, then the estate, though situated in *France*, so far as it embraced the share of *Benoit Courvoisier*, passed, at his death, to his children, under the law of *Indiana*; because the succession to personal property is governed exclusively by the law of the actual domicile of the intestate. Story on Conflict, &c., § 481.

Did the estate, upon the testator's decease, vest in the children described in the will? *Rumsey v. Durham*, 5 Ind. R. 71 seems to be in point. There, a testator, by his will, gave to his wife as long as she should remain his widow, the use of all his real and personal property, for the support of herself and family. The will then proceeded as follows: "After the death or marriage of my wife, my will is that all my property, real as well as personal, shall be sold, and equally divided among my children. *Held*, 1. That the direction to sell was, in effect, a conversion of the land into personalty, and that, in equity, the land must be treated as money. 2. That the property vested in the children at the decease of the testator. This decision is fully sustained by principle and authority, and we are inclined to follow it. The result is that the will before us, at the testator's decease, *eo instanti*, gave the children of *David*

L. Courvoisier a vested estate, though it was not, until the decease of the widow, and his death, to be distributed among them. 4 Kent's Com. 291.—1 Jarm. on Wills, pp. 638, 639.

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But on the trial of the cause, various questions relative to the admission of evidence were raised, which it becomes our duty to notice.

The Court, at a term prior to the one at which the cause was tried, made an order authorizing the plaintiff to take depositions in this action, on his behalf, at *Chaux de Fonds*, in the canton of *Neufchatel*, *Switzerland*, and requiring such depositions, when taken, to be certified as depositions taken in this state are certified. The plaintiff, under the order, having taken the deposition of *Auguste Delachaux*, and the same being published, the defendant moved to suppress it upon the ground that it was not certified in accordance with the order of the Court; but his motion was overruled. The certificate appended to the deposition is as follows:

"I, *Isaac C. Ducommon*, justice of the peace, &c., do certify that the foregoing deposition of *Auguste Delachaux* was taken before me at the office of *Auguste Delachaux*, a notary public at *Chaux de Fonds*, in the canton of *Neufchatel*, *Switzerland*, on the 21st day of *August*, 1855, between the hours of 8 o'clock, A. M. and 5 o'clock, P. M., of said day. Given under my hand and seal, this 21st of *August*, 1855. *Isaac Charles Ducommon*, justice of the peace. [SEAL]."

When depositions are taken in a foreign country, they must be certified in such manner as the Court shall direct. 2 R. S. p. 88, § 262. Here, the Court directed that they should be certified as depositions taken in this state are certified. In order, then, to test the validity of the certificate in question, we must refer to the rule of practice on that subject found in our code of procedure. Section 257 of the above chapter requires the officer who takes the deposition to certify that the deponent was sworn according to law; by whom it was written; and whether or not the adverse party attended. As none of these requirements appear in the certificate before us, the deposition cannot be

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held to be certified as depositions taken in this state are certified. And the result is that the action of the Court in overruling the motion to suppress, must be held erroneous.

Another error is assigned. The Court, over the defendant's objection, admitted in evidence a certified copy of the will of *Daniel F. Courvoiser*, and what purports to be its probate, from the registry of the declaration of wills at *Paris*, in *France*. Against this ruling, the appellant relies upon a provision of the statute which relates to foreign wills, and which enacts that "such will, or a copy and the probate thereof, may be produced to the Court of Common Pleas of the county in which there is any estate on which the will may operate, and if the Court shall be satisfied that the instrument ought to be allowed, such Court shall order it to be filed and recorded, and thereupon, such will shall have the same effect as if it had been originally admitted to probate in this state." 2 R. S. p. 317, § 36. The words "shall have the same effect," &c., as used in this provision, evidently refer to a preceding section of the same statute, which authorizes a certified copy of a domestic will and its probate to be read in evidence without further proof. *Id.* p. 316, § 32. And, in view of the latter section, we have decided that a will, before it can be used in evidence, must have been admitted to probate, *Rogers v. Stevens*, 8 Ind. R. 465.

But it is insisted that the will in this case does not operate on any estate, and was, therefore, admissible without being filed and recorded in the Common Pleas. The position thus assumed is untenable. The will, it is true, does not pass the estate in controversy from *Benoit Courvoisier* to his daughter—the law of *Indiana* does that; but in the absence of the will, it could not be found that under its provisions he ever was entitled to an estate which could pass from him under the law of this state. Indeed, it constitutes the very first link in the plaintiff's chain of title, and, therefore, must be held to operate upon the estate in contest. In our opinion, the statute to which we have referred intends that a foreign will, or a copy and the probate thereof, shall not be used as evidence in the Courts of this state,

unless the same has been produced to the Common Pleas, and by that Court directed to be filed and recorded. It follows that the Court, in this instance, should have excluded the evidence.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Sullivan and J. Dumont, for the appellant.

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An information charging that an offense was committed *on or about* a certain day, is not bad for not alleging the offense to have been committed on a day certain. The words *or about*, are surplusage.

The information in this case charges several persons, naming them all, with a riot. They took their trial separately. Upon the trial of the appellant, the Court instructed the jury that if the defendant and more than one *other person* entered the house, &c., he must be found guilty. *Held*, that this was error.

APPEAL from the *Decatur* Court of Common Pleas.

Saturday,
June 19.

DAVISON, J.—The information in this case charges that, on or about the 26th of *January*, 1857, *Bernard Hardebeck, Gerard Rhule, Gregory Starbuck, Casper Suhre, Matthias Wortz, Conrad Ditchler, Francis Reidleman and John Suhre*, in a riotous, tumultuous, violent and unlawful manner, entered the dwelling house of *Peter Krench*, and then and there destroyed his property, &c. The defendants, severally, moved to quash the information; but their motions were overruled, and thereupon the Court, at their instance, allowed them separate trials. *Hardebeck*, being arraigned, &c., pleaded not guilty. There was a verdict for the state, upon which the Court, having refused a new trial, rendered judgment.

The information is said to be defective, because it does not allege the offense to have been committed on a day certain. Its language is, "*on or about* the 26th of *January*, 1857." *Hampton v. The State*, 8 Ind. R. 336, is precisely

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ERN INDIANA
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in point. There the indictment charged that the offense was committed *on or about* the 30th day of *December*. *Held*, that that charge did not render the indictment invalid; that the words *on or about* were immaterial and mere surplusage.

The Court, upon the plaintiff's motion, charged the jury as follows: "If you find that *Bernard Hardebeck* and more than one other person entered the house of *Peter Krench*, the prosecuting witness, without his consent, in a violent manner, and made a great noise in the house, you must find the defendant guilty." This instruction seems to be erroneous. The information assumes to name all the persons engaged in the riot, and unless two or more of the persons thus named acted jointly with the defendant in entering the house, &c., he could not be guilty. But under the instruction, the jury were authorized to convict him, though the persons with whom he acted were not charged in the information. The charge may have misled the jury.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Gavin and *O. B. Hord*, for the appellant.

J. S. Scobey and *W. Cumback* for the state.

THE NORTHERN INDIANA RAILROAD COMPANY v. MARTIN.

This case falls within the decision in the case of *The Lafayette and Indianapolis Railroad Company v. Shriner*, 6 Ind. R. 141.

Saturday,
June 19.

APPEAL from the *St. Joseph* Circuit Court.

DAVISON, J.—*Martin*, the plaintiff below, brought an action before a justice of the peace against the railroad company, to recover the value of a cow, alleged to have been killed by the defendants' locomotive while running on the road. The justice gave judgment for the plaintiff, from which the defendants appealed. In the Circuit Court there

was a verdict in favor of the plaintiff, upon which the Court, having refused a new trial, rendered judgment.

The record contains the evidence. It proves that the cow belonged to the plaintiff, and was worth 30 dollars; that she was killed on the track of the *Northern Indiana Railroad*, by a locomotive of the company, and at a place on said track where it crosses a public highway. It was also shown that the road was securely fenced on each side, and that there were at its crossings sufficient cattleguards.

These facts were clearly proved on the trial. There is, indeed, no material conflict in the testimony. Neither the complaint nor the proofs in any degree tend to show negligence or misconduct in the company's agents in running the train.

The case at bar plainly falls within that of *The Lafayette and Indianapolis Railroad Company v. Shriner*, 6 Ind. R. 141. The reasoning of the Court in that case evidently applies to the one before us. It follows that the verdict was unsustained by the evidence, and a new trial should have been granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles, for the appellants.

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1858.

CRIST
v.
BROWNS-
VILLE TOWN-
SHIP.

CRIST v. BROWNSVILLE TOWNSHIP.

It is for the township trustees to determine where school-houses are necessary and convenient; and a contract by the trustees for the building of a school-house is binding on the township, though one of the trustees protested against it.

APPEAL from the *Union Circuit Court*.

DAVISON, J.—This was an action by *Crist* against *Brownsville* township, upon an agreement in writing. The agreement bears date *February 20, 1856*; it is alleged to be between said township and *Crist*; and it contains the

10	461
146	294
10	461
155	157
10	461
168	247
10	461
166	140

10	461
171	292

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following stipulations: "*Crist* agrees to build a school-house [describing its dimensions] on the south-east corner of *Henry King's* land, to be constructed with good materials and in a workmanlike manner, to be completed on or before the first of *May*, 1856. And the trustees of the township agree to pay *Crist* 391 dollars, one-half to be paid on the completion of the house, and the balance on the 25th of *December*, 1856. [Signed,] *John A. Sharkey*, *James Cunningham*, trustees of *Brownsville* township. *Christian Crist*, contractor."

The complaint avers that the agreement was, on the — day of —, 1856, duly ratified and affirmed by the defendant; that the plaintiff, on his part, had fully performed it, but that the defendant had failed to pay the 391 dollars or any part thereof, wherefore the plaintiff demands judgment, &c.

The defendant demurred to the complaint; but his demurrer was overruled. And thereupon he answered by a general denial.

The Court tried the cause and found for the defendant. Judgment was accordingly rendered, &c.

The evidence shows that at a regular session of the trustees of said township, held on the 26th of *January*, 1856, the propriety of having a school-house in conjunction with *Harrison* township was discussed, and the construction of such house in *Brownsville* township, near the line of *Harrison* township, on *Henry King's* land, was agreed on—certain citizens of the former township having agreed to build it by subscription, in the form of a donation, provided the trustees would give them, annually, receipts to the county treasurer for their portion of the building tax, &c. It was further shown that the trustees met on the 20th of *February*, 1856—all of them being present—when the following proceedings were had: "The building of the school-house in district No. 4, on the south-east corner of *Henry King's* land, was let to *Christian Crist*, said *Crist* being the lowest bidder. Dimensions of house and manner of workmanship specified in article of agreement on file in the clerk's office." It was proved that the plaintiff

built and completed the house, according to the agreement sued on.

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1858.

The plaintiff having rested, the defendants produced two witnesses, who testified that, in their belief, the school-house constructed by the plaintiff was unnecessary, there being another school-house in the center of the same district. It was also shown that *Groves*, one of the trustees, had opposed the erection of the house in question, and had given his written protest against the action of a majority of the trustees in respect to such building. The above is believed to be, in substance, all the evidence in the cause.

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V.
BROWNS-
VILLE TOWN-
SHIP.

The statute requires the trustees of each civil township to establish and conveniently locate a sufficient number of schools in their respective townships, and to make contracts for the building and repair of school-houses. 1 R. S. p. 440. We have seen that the trustees, while in session, on the 26th of *January*, agreed to build the house in conjunction with an adjoining township; but the contract then made seems to have been abandoned, and therefore it has no important bearing in the consideration of the case. There was, however, a regular meeting of the same trustees on the 20th of *February*, at which they let the building of the house in question to the plaintiff, upon the terms and for the amount stated in the agreement sued on. We think these proceedings are consistent with the statute to which we have referred, and bind the township to the fulfillment of the written contract entered into by the trustees.

It was for the trustees to decide whether the school-house was necessary and convenient, at the point where it was located; and, in our opinion, the evidence before us does not show their decision in this instance to have been incorrect. Nor is there anything in the fact that one of the trustees protested against the erection of the house. Two being a majority, were competent to transact the business. The finding of the Court is, no doubt, unsustained by the evidence, and the plaintiff is, therefore, entitled to a new trial.

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1858.

MILLS
v.
SIMMONDS.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

J. Yaryan and ——— *Bennett*, for the appellant.

J. S. Reid and *J. F. Gardner*, for the appellees.

MILLS v. SIMMONDS.

10	464
220	309

Saturday,
June 19.

APPEAL from the *Allen* Circuit Court.

DAVISON, J.—This was an action commenced by process of foreign attachment. *Mills* was the plaintiff below, and *Simmonds* the defendant. The complaint is upon an account consisting of various items, amounting in the aggregate to 1,794 dollars. Proper issues being made, the case was submitted to a jury, who found for the plaintiff 10 dollars. New trial refused, and judgment.

The record shows that the cause was tried on the 23d of *February*, 1853; and on that day a bill of exceptions was taken and filed. The bill, after stating the names of the parties, &c., proceeds—

“The following evidence being before the jury, viz., three sets of depositions, the Court charged the jury as follows: (here insert the charge in the handwriting of the judge). To which the plaintiff objected. The Court overruled the objection, to which ruling the plaintiff excepted. And also, on said trial the plaintiff requested the Court to give the following charge: (here insert in the handwriting of *Jacoby*). Which the Court refused to do, and the plaintiff excepted to said last ruling,” &c.

The clerk, in making a transcript of the record for this Court, has inserted what purport to be depositions given in evidence on the trial; also instructions given, and an instruction refused by the Court. But these alleged rulings are not properly before us; because, under the rules of practice, as they stood when these exceptions were taken, the clerk had no right to make such insertions in a bill of

exceptions, unless authorized to do so by agreement of the parties entered upon the record. The depositions, charges given, and charge refused should have been copied into the bill at the time it was signed by the judge. 4 Blackf. 19. —6 *id.* 167.—7 *id.* 461. There being, then, no proper bill of exceptions upon which to found the assigned errors, the appeal must be dismissed.

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1858.

CHAPMAN
v.
LONG.

Per Curiam.—The appeal is dismissed with costs.

L. C. Jacoby, for the appellant.

D. H. Colerick, for the appellee.

CHAPMAN v. LONG.

Where a sale of real estate precedes the execution of the deed by some time, a verbal reservation or stipulation in reference to anything that would legally pass by the deed without such reservation, &c., will be presumed to be merged in the deed; and where the deed is executed at the time of the sale, such a reservation, &c., will be considered in the light of an exception or defeasance, and being repugnant to the legal effect of the deed, will be held void. A conveyance of the freehold passes emblements, where nothing is said on the subject.

10 465
139 407

APPEAL from the *Kosciusko* Circuit Court.

Tuesday,
June 22.

HANNA, J.—This was an action to recover a specific article of personal property, to-wit, certain wheat.

The answer is, first, a general denial; secondly, that the defendant, on the 27th of *January*, 1854, purchased of the plaintiff certain lands upon which said wheat was growing, and took a deed of full covenants of warranty, and therefore, &c. Reply, that at the time of the sale, the wheat was by parol expressly reserved by the plaintiff, &c. Demurrer to the reply sustained.

The question is, whether under these circumstances, a parol agreement, by which the growing crop was reserved, is binding.

Whatever may be the law, as between landlord and ten-

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1858.

CHAPMAN
v.
LONG.

ant, or in reference to mortgaged premises, &c., we think in the case at bar the law is, that if the *sale* was some time before the execution of the deed, any verbal reservations or stipulations in reference to anything that would legally pass by the deed without such reservations, &c., would be presumed to be merged in the deed; and if made at the time the deed was executed, it would be considered in the light of an exception or defeasance, and being repugnant to the legal effect of the deed, would be void—the legal effect of the deed being, that it passed all the incidents to the land, among others the emblements, as well as the land itself. *Noble v. Bosworth*, 19 Pick. 314.—*Austin v. Sawyer*, 9 Cow. 39.—*Pattison v. Hull*, *id.* 747.—*Mott v. Palmer*, 1 Comst. 564.

Without doubt, a growing crop on land, the fruits of industry, passes to the executor and not to the heir. It is subject to execution as personal property, and may be sold by the owner as such. But nevertheless, if the owner of the soil does not dispose of it as personal property, but conveys the freehold, it passes as an incident thereto, where nothing is said upon the subject; and, therefore, no mere verbal agreement can be received to contradict either the express terms, or the legal effect of the deed.

The demurrer was properly sustained to the second paragraph of the answer.

Per Curiam.—The judgment is affirmed with costs.

WORDEN, J., having been of counsel in the cause, was absent.

J. S. Frazer, for the appellant.

G. W. Frasier and *J. B. Howe*, for the appellee (1).

(1) Counsel for the appellee argued as follows:

The only material question here is, whether the deed was sufficient to pass the wheat, and whether the wheat appears to have passed by the deed. Let us see how the case stands upon authority.

In *Austin v. Sawyer*, 9 Cow. 39, it was expressly held that such a reservation was not admissible in evidence, because it contradicted the deed. So in *Mott v. Palmer*, 1 Comst. 564. *Trullinger v. Webb*, 3 Ind. R. 200 is a strong case. The Court says: "The understanding and agreement of the parties relative to the reservation [of coal] must be ascertained by the face of the conveyance itself." See, also, *Foley v. Cowgill*, 5 Blackf. 18, and notes; *Let v.*

Horner, id. 296; *Allen v. Lee*, 1 Ind. R. 58; *Harvey v. Laflin*, 2 Ind. R. 477; May Term, Hilliard on Real Property, p. 58; Sug. on Vendors, 106 to 110; 2 Johns. 37; 1858.
3 *id.* 321.

BURKHAM
v.
PIERCE.

A deed absolute in its terms, cannot be controlled by oral evidence of conversation between the parties previous to its execution. *Vermont C. R. Co. v. Hills*, 23 Vt. R. 681. This was a case where the grantor verbally reserved the use of a spring, and directed the appraiser not to "take into account" the water in appraising damages,—held that the right to the use of the water passed by the deed. In *Conner v. Coffin*, 2 Fost. (N. H.) 538, it was held that a quantity of manure in the barn, in a place fitted for the purpose behind the cattle stall, passed to the grantee by ordinary effect of the deed, and that a parol reservation either before or at the time of making the deed, could not control its legal effect and operation. A deed of land conveys the property described in its existing state. *Duncle v. Wilton R. Co.*, 4 Fost. 489. When there is a deed in writing, it will admit of no parol contract, adding to, varying, or deducting from it, unless the foundation is first laid, by alleging fraud, accident, or mistake. *Logan v. Bond*, 13 Geo. R. 192. No condition, limitation or reservation inconsistent with the terms of a deed, is admissible in evidence. *Rathbun v. Rathbun*, 6 Barb. Sup. Ct. 68. In *Gibbons v. Dillingham*, 5 Eng. (Ark.) 9, it was held that when a deed of conveyance contained no reservation to the grantor, of the growing crop, it could not be proved by parol.

Now in answer to elementary principles clear and settled, and so many decisions, of which one is in our own state, in relation to a parol reservation of coal, one in *New Hampshire*, relating to a parol reservation of manure, one or more in *New York*, and one in *Arkansas*, relating to a parol reservation of crops, (and undoubtedly there are many others which we have not seen,) we are referred to a single and notable case in *Ohio*, *Baker v. Jordan*, 23 Ohio, 438, the decision of a Court somewhat noted for its originality. Neither its authority nor its reasons are sufficient to turn the scale of judicial opinion, from the side to which it has so long inclined, aside from the easy solution afforded by general principles.

BURKHAM v. PIERCE and Another.

This case is decided upon the evidence.

APPEAL from the *Dearborn* Circuit Court.

Tuesday,
June 22.

Per Curiam.—Suit by the appellees against the appellant for the hire and use of a horse and buggy, and for damage and injury done to the same while in the possession of the defendant, through his alleged carelessness and negligence. Trial by the Court, finding for the plaintiffs 86 dollars, 25

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BURKHAM
v.
PIERCE.

cents, on which there was judgment, over a motion for a new trial.

Exception was taken, setting out the evidence. The finding of the Court upon the evidence, and its refusal to grant a new trial, are the only matters complained of.

The evidence shows that *Burkham* hired the horse and buggy of *Pierce & Craft*, to go from *Lawrenceburg* to *Cincinnati* and back, and that while the horse and buggy were returning from *Cincinnati* in charge of one *Mason*, as the agent of *Burkham*, they came in collision with a wagon going in an opposite direction, whereupon the horse suddenly started and ran away, breaking the buggy, causing damage, which, with the use of the horse and buggy, amounted to the sum found by the Court. There was testimony showing that the injury happened through the careless manner in which *Mason* was driving at the time of the collision; but there was some conflict on this point. On the other hand, there was proof showing that the horse had once before, in *June*, 1854, run away; and that such a horse is not safe. Several witnesses, however, testified that they had driven the horse in a buggy, and that he appeared trustworthy and safe, and was not hard-mouthed, and was easily checked up. Four witnesses testified that after the time when the horse ran away in *June*, 1854, they had driven him, and he manifested no disposition to run away, and though spirited, he seemed safe and manageable.

The Court found from the evidence, "that the horse was an ordinarily and reasonably safe horse, and that the said *Mason* might have avoided said collision, by the exercise of such care and caution as he ought to have used."

Upon an examination of the evidence, we cannot say that the finding was clearly wrong, and therefore the judgment must be affirmed.

The judgment is affirmed with costs.

P. L. Spooner and *A. Brower*, for the appellant.

J. Ryman, for the appellees.

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1858.

TAM v. SHAW.

TAM
v.
SHAW.

In a suit by the assignee of a promissory note against the indorser, a transcript of a suit by the assignee against the maker, before a justice of the peace, was offered in evidence, by which it appeared that the cause was tried on its merits, and judgment rendered for the defendant, because the note was given without consideration. *Held*, that this record was *prima facie* evidence against the validity of the note, even if the indorser had no notice of the proceedings.

But if the complaint in such case allege such notice, and the answer nowhere deny it, it need not be proved.

The person having possession of a promissory note, is presumed to be the equitable owner of it, although it be not indorsed by the payee; and such person may transfer it by indorsement in such a manner as to make himself liable to an action by the assignee.

By such an indorsement, the note is warranted to be valid, and the maker solvent and able to pay it; and diligence to collect of the maker is only necessary in reference to the latter branch of the warranty.

Where a note is invalid, suit may be brought immediately against the indorser, without having sued the maker.

APPEAL from the *Cass* Court of Common Pleas.

Tuesday,
June 22.

WORDEN J.—This was an action by *Shaw*, the appellee, against *Tam*, the appellant, in the *Cass* Common Pleas, on the assignment of a promissory note. The complaint states that on the 17th of *April*, 1854, one *Nathaniel Sweet* made his promissory note (of which a copy was filed), by which he promised to pay to one *Henry Galloway*, or bearer, 50 dollars, which note came into the possession of the appellant, who indorsed the same to the appellee. It is further alleged that on the 11th of *September*, 1854, and within one month after the note became due, the appellee commenced a suit before a justice of the peace, on said note, against the maker, *Sweet*, which cause was tried on the 29th of the same month; and that he failed to recover a judgment against *Sweet*, he proving that the note was obtained from him without consideration therefor. It is also alleged that the appellee gave the appellant due notice of the time said suit would be tried before said justice; and that the justice rendered judgment against the appellee for costs, and that the note and costs remain unpaid.

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TAM
v.
SHAW.

To this complaint the defendant below demurred, but the Court overruled the demurrer.

The defendant below then filed an answer of nine paragraphs, as follows, viz.:

1. That said *Sweet* never made said note.
2. That said *Shaw* never sued him on it as alleged.
3. That the note did not fail for want of consideration.
4. That there is no record of any such suit or judgment.
5. That *Tam* never assigned said note to *Shaw*.
6. That said *Galloway* never assigned said note to *Tam*.
7. That said defendant does not owe the plaintiff.
8. That said note was not given without consideration.
9. That said note was founded on a good consideration.

There was a demurrer filed to the whole of this answer.

The record is silent as to the disposition of this demurrer, not showing that it was determined by the Court; but the plaintiff below afterwards replied to the 2d, 3d, 4th, 7th, 8th and 9th paragraphs of the answer (thereby waiving his demurrer so far as they are concerned), taking issue thereon. The cause, on the issues thus joined, was submitted to the Court for trial—a jury being waived—which resulted in a finding for the plaintiff below, and judgment was rendered accordingly.

Before judgment, the defendant below moved for a new trial, and filed his reasons therefor, alleging that the finding is contrary to law and not supported by the evidence. Motion overruled and exceptions taken, setting out all the evidence offered in the case, which consists of the note described in the complaint, and the indorsement thereon by *Tam* to *Shaw*, and the transcript of a justice of the peace of the proceedings and judgment described in the complaint.

We have not examined as to the sufficiency of the complaint, for the reason that no exception was taken to the overruling of the demurrer thereto. If there was error in overruling said demurrer, it was waived by the neglect to except. *Zehnor v. Beard*, 8 Ind. R. 96.

It was perhaps erroneous to proceed to the trial of the

issues of fact until the issues of law, raised by the demurrer to the 1st, 5th and 6th paragraphs of the answer, were disposed of. *Gray et al. v. Cooper*, 5 Ind. R. 506. But we cannot notice this error, as no exception was taken, and it is not assigned for error. On appeals to this Court there must be a specific assignment of all errors relied upon, or they will be considered waived. 2 R. S. p. 161, § 568.—*Hollingsworth v. The State*, 8 Ind. R. 257.

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v.
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The errors assigned are—

1. That the Court erred in finding in favor of *Shaw*.
2. In overruling a motion for a new trial.
3. In rendering judgment against *Tam*.

The only question before us is, whether the evidence offered on the trial, makes out the case, and entitles the plaintiff below to judgment.

The note and indorsement offered in evidence, correspond with those set out in the complaint. The note was dated *April* 17, 1854, and payable four months after date, and assigned by *Tam* to *Shaw* on the 20th of *May* of the same year.

It appears by the transcript offered in evidence, that on the 11th of *September*, 1854, a suit was commenced by *Shaw* in the name of *Henry Galloway*, for the use of *Shaw*, against the maker of the note, *Sweet*, before a justice of the peace of *Carroll* county, and the cause was set for trial on the 18th of the same month. On the 18th, the cause was dismissed for want of security for costs, the plaintiff not being a resident of that county; but on the 25th of the same month, it was reinstated, and the time for trial fixed for the 29th of the same month, a new summons being issued returnable on that day. On the 29th, the parties appeared and the cause was tried, and judgment rendered in favor of the defendant therein, upon the ground, as appears from the justice's transcript, that it appeared by the testimony "that the note was obtained without value received."

This was all the evidence offered in the case, and upon it three questions are presented by counsel:

1. Was it necessary, under the issues, to prove notice to

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the defendant below of the time of the trial before the justice?

2. Can an action be maintained on the indorsement?

3. Has the plaintiff below shown due diligence to collect of the maker of the note? or if not will *laches* discharge the indorser?

It will be observed that the complaint alleges that the plaintiff below "gave the defendant due notice of the time said suit would be tried before said justice." We have copied in this opinion the entire answer of the defendant, and we think there is nowhere contained in it a substantial denial of this allegation in the complaint. There was no proof of notice, but there was no need of any such proof, unless the matter was controverted by the answer. It is provided by 2 R. S. p. 44, § 74, that "every material allegation in the complaint not specifically controverted by the answer, and every material allegation of new matter in the answer not specifically controverted in the reply, shall, for the purposes of the action, be taken as true." We think that, under the pleadings in the case, the allegation respecting notice must be taken to be true.

There is also another view that may be taken of this point. From the record of the justice offered in evidence, it appears that the cause was tried on its merits, and judgment rendered for the defendant therein, the maker of the note, because it was given without any consideration. This record we think is *prima facie* evidence against the validity of the note, although the indorser had no notice of the proceedings. *Howell v. Wilson*, 2 Blackf. 418. It is not *conclusive*, in the absence of such notice, and in such absence, the defendant below might, on the trial of this cause, have introduced evidence to remove this *prima facie* presumption, and to show that the note was valid and the maker liable thereon; but no such evidence was given or offered.

Can an action be maintained on this indorsement?

It is contended by counsel for the appellant, that inasmuch as there is no indorsement from *Galloway*, the payee,

to *Tam*, the indorser, his indorsement to *Shaw* gives *Shaw* no right of action against him, the legal title to the note not passing; but we do not concur in this view of the case. *Tam*, having the possession of the note, must be presumed to be the equitable owner thereof, and entitled to the proceeds, although there was no indorsement from *Galloway*, the payee. *Bush v. Seaton*, 4 Ind. R. 522. We think he could transfer the note by indorsement in such a manner as to make himself liable to an action thereon. *Story*, in his work on Bills of Exchange, § 199, says: "If a bill is not originally made negotiable, &c., it may be transferred by the payee or holder thereof, either by delivery or by indorsement, in such a manner as to bind himself and to give his immediate assignee a right of action thereon against himself, but not to give him a right against any of the antecedent parties which can be enforced *ex directo*, at law (however it may be in equity) in his own name."

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We think the assignment of *Tam*, in this case, subjected him to the same liability to his assignee, that would have attached had the note been duly assigned to him by *Galloway*, the payee.

No question as to due diligence, in our opinion, arises in the case.

By the indorsement of the note the appellant warranted two things: 1. That the note was valid; and 2. That the maker was solvent and able to pay it. "Due diligence" to collect of the maker, is only necessary in reference to the latter branch of the warranty. Where a note is invalid, suit may be brought immediately against the indorser, without having sued the maker. *Johnson v. Blake*, 3 Ind. R. 542.—*Henderson v. Fox*, 5 *id.* 489. There is no complaint in this case of the insolvency of the maker. The action is founded upon the other branch of the warranty, and might have been maintained without any suit against the maker, upon proof that the note was given without any consideration; and we think the suit against the maker, the record of which was given in evidence, supplies this proof.

It is objected to the proceedings against the maker, that

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the appellant was not a party thereto, and we are referred to § 6, 2 R. S. p. 28, by which it is provided that, "when any action is brought by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant to answer as to the assignment, or his interest in the subject of the action." It is true that the action against the maker was in the name of *Galloway*, the payee, for the use of *Shaw*, whereas, perhaps, in strictness, it should have been in the name of *Shaw*, making *Galloway* a defendant to answer as to his interest in the note; but no objection was taken in the case to the proceedings, and the cause was tried upon its merits, and we think no objection can be taken thereto by *Tam*. He was not required to be made a party, having transferred the note to *Shaw* by indorsement in writing; and having made such indorsement, he cannot, with much grace, contend that *Galloway* still had an interest in the note.

We are of opinion that the evidence justified the finding and judgment of the Court below.

Per Curiam.—The judgment is affirmed with costs.

H. P. Biddle and *B. W. Peters*, for the appellant (1).

S. L. McFadin, for the appellee (2).

(1) Counsel for the appellant made the following points:

1. No action will lie against *Tam* in favor of *Shaw*, founded alone on the note and *Tam*'s assignment. To authorize such a suit, there should have been an assignment from *Galloway* to *Tam*. The late statute (2 R. S. p. 28, § 6) will not aid *Shaw* in this proceeding.

2. Admitting *Tam* to be liable to *Shaw* on his assignment, and admitting that he is bound by the proceedings before the justice against *Sweet*, still the evidence will not support the judgment. *Shaw* has not used due diligence. The time that he sued *Sweet*, or rather the time that *Galloway* for his use sued him, must be taken to be the 29th of *September*, not the 11th, when the ineffectual proceedings were commenced, which were afterwards dismissed on account of *Shaw*'s or *Galloway*'s negligence. This is 42 days after the note fell due, which delay, unexplained, will discharge *Tam* as assignor. And even if we take these proceedings as having been commenced on the 11th of *September*, the delay, unexplained, is still too great to amount to due diligence on the part of *Shaw*. *Hanna v. Pegg*, 1 Blackf. 181.—*Bishop v. Yeazle*, 6 id. 127.—*Merriman v. Maple*, 2 id. 350.—*Spears v. Clark*, 7 id. 283.—*Spears v. Clark*, 3 Ind. R. 296.

8. But *Tam*, having had no notice of the proceedings against *Sweet*, and not having been made a party to the suit, is not bound by such proceedings. 2 R. S. p. 28, § 6.

(2) Counsel for the appellee cited *Slaughter v. Foust*, 4 Blackf. 380; *Clearwater v. Rose*, 1 id. 137; 1 Caines, 363; *Johnston v. Dickson*, 1 Blackf. 256; *Youse v. M'Creary*, 2 id. 243; *Howell v. Wilson*, id. 413; *Fosdick v. Starbuck*, 4 id. 417; *Berger v. Henderson*, 5 id. 545; *Clark v. Walker*, 6 id. 82.

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It is decided in this case, that the parties to the agreement recited in the opinion were, upon the evidence referred to, to be regarded, as to the public, as partners.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Tuesday, June 22.*

Per Curiam.—Suit by *Walter Cornell* against *Evan Stephenson*, to recover the value of a yoke of oxen alleged to have been wrongfully taken by the latter from the former person. Answer in general denial. Trial, and judgment for the plaintiff. Motion for a new trial, &c.

It appears that on the 14th day of *July*, 1853, *Jesse Stingley* and *Evan Stephenson* entered into an agreement as follows:

"This witnesses that we, *Jesse Stingley* of *Tippecanoe* county, *Indiana*, and *Evan Stephenson* of *Scott* county, *Kentucky*, have this day entered into a co-partnership for one year from this date, to-wit, for 12 months from *July* 14, 1853, to *July* 14, 1854, upon the following terms, to-wit: The said *Jesse Stingley* is to move his family into the house upon *E. Stephenson's* farm on *Big Pine*, now occupied by *Ab't Jackson*, by the 1st of *October* next, and from this date (*July* 14th) the said *Stingley* takes charge of all said *Stephenson's* interest upon said farm, viz., 114 head of feeding cattle, valued at about \$31.97 cents a head; 1 yoke of oxen which cost \$102.60 cents; 1 do. cost \$80; 1 pair mules cost \$250 (left simply in care of said *Stingley*); about 40 head of hogs, sows and pigs, valued at \$90; all said *Ste-*

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phenson's rent corn (amount not known exactly), and all the corn said *Stephenson* has bought of *Dawley, Jackson,* and *Mosgrove*—say about 120 acres; said *Stephenson's* interest in oats and hay or grass, which cost 120 dollars; hay rake \$8, &c. &c., too tedious to mention; 1 old gray, mealy mare; 1 fine roan mare; 1 fine gray-eagle mare and colt; 1 gray horse, 3 years old; 1 gray yearling; 1 bay mare; 1 bay horse, &c. &c. Said *Stingley*, in the absence of said *Stephenson*, agrees to manage, take care of, and see to, said farm and stock, preserving the timber from waste, and keeping the stock, (as far as in his power lies,) from loss and straying—feeding, cherishing and fattening the same. Said *Stingley* and said *Stephenson* enter into partnership on these principles, to-wit: The partnership is charged with interest at 6 per cent. on the capital invested in cattle and hogs (*Stephenson's* horses excepted, said horses not coming into the partnership). The partnership is charged with all expenses needful to keep the farm in repair, to the advantage of stock, but not with buildings and new fences, and such like. *Stephenson* furnishes the capital and *Stingley* is to keep the farm in repair, and fix and arrange and superintend all improvements desired and provided for by said *Stephenson*, and to have them made in reasonable time, and at the smallest possible expense; and after capital, interest, and expenses are taken out (upon sale of stock) said *Stingley* is to have one-third of all the clear profits, and *Stephenson* two-thirds of the same. *Stingley* enters forthwith upon the discharge of his obligations, and promises to push forward and complete (if possible) the fencing of the large pasture-field on said farm by the 1st of *August*, and to have everything done after the most farmer-like fashion; to employ, at expense of partnership, a force to cut as much wild grass, and stack and salt the same, as he can possibly get put up on and against to the farm. It is understood that no geese are to be allowed to run or subsist on said farm. About 45 acres of the land—say the 30 acres tended by *Jones* this year, and 15 acres adjoining—are to be put in oats next spring, and sown down in timothy and clover at expense of partnership. It is distinctly under-

derstood that *Stephenson* is entitled to two-thirds of the entire profits on all the rents, and on all profits on stock, grain sold, and everything. For breaking fresh land that has never been broke, the partnership furnishes the team and break-plow; but *Stephenson*, individually, pays for the services of the hand breaking. Partnership pays for breaking any lands that were once broke, but are now foul. *Stingley* pays all hands and board of same, for services of same in tending crop on lands that are now already broke. *Stingley* makes no charge against *Stephenson* and his friends for board when on the farm. *Stephenson* allows said *Stingley* to keep 4 or even more horses upon said farm free of expense to said *Stingley*, provided said horses are devoted exclusively to the services of the farm. All and every description of produce raised on the farm by *Stingley* comes into the partnership, interest to be divided as above. *Stingley* keeps 5 or 6 cows free of cost, but their calves, when weaned, come into the partnership at a fair valuation. All the hogs *Stingley* brings to the farm are to come into the partnership at a fair valuation. *Stingley* is allowed to keep 20 sheep free of cost this summer, but to pay for their wintering. *Dawley* and *Mosgrove* are to remain on the farm from 1st of *March*, 1854, for one year if they wish to. If said *Stephenson* wishes to bring blooded stock of any description upon the farm, the costs and expenses are to be remembered and put on book, and profits divided as on other stock. If the parties differ on any point, &c., they are to choose," &c.

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While in possession, under the foregoing agreement, *Stingley* sold a yoke of oxen furnished to the farm by *Stephenson*, to one *Lowry*, who subsequently sold them to one *Orion Stingley*, who sold them to the plaintiff. While they were in plaintiff's possession under his purchase, *Stephenson* seized and took them away, and converted them to his own use, denying that *Jesse Stingley* had any property in, or right to dispose of, any stock upon the farm, by virtue of his connection in business with said *Stephenson* under the agreement copied.

To what extent the written instrument constituted the

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parties to it partners *inter se*, it is not necessary we should decide.

There was some evidence tending to show that *Stephenson* and *Stingley* held themselves out to the public as partners, and that *Stingley* sold stock.

Under the circumstances of the case, we think, as to the public, *Stingley* must be regarded as a partner, with power to bind his co-partner by the sale of the oxen.

The judgment is affirmed with 5 per cent. damages and costs.

W. C. Wilson, G. S. Orth and J. A. Stein, for the appellant.

S. W. Telford and T. Dame, for the appellee.

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A. sold to *B.* all his interest in the stock of merchandize, notes and accounts, belonging to the firm of *A.* and *C.*, including the profits that had accrued in trade, and *B.* agreed to pay all the debts of the firm of *A.* and *C.* and to fully indemnify *A.* against any liability for the same. *Held*, that under such an agreement, a simple error on the books of *A.* and *C.*, by which it appeared that the firm was indebted less than it really was, or that it had more due than was really due, was not, in the absence of fraud and misrepresentation, a matter that *B.* could set up in discharge of his liability on his part of the contract.

Wednesday,
June 23.

APPEAL from the *Wells* Court of Common Pleas.

WORDEN, J.—This was an action brought by the appellant against the appellee, upon a contract entered into by them and one *Sebastian Keely* on the 22d day of *February*, 1853, by which the said *Abey*, in consideration of 1,497 dollars, sold and conveyed to *Bennett* “all his right, title and interest to the stock of merchandize, notes and accounts owned by said *Abey* and *Keely*, trading under the name and style of *Abey & Keely*, including all the profits which had accrued in trade, and by which the said *Keely* and the said *Bennett*, jointly and severally, agreed to assume and

pay all debts against said firm, and fully indemnify the said *John Abey* against any liability for the same. It is alleged in the complaint that said contract was violated in this, that the plaintiff has not been kept indemnified, but on the contrary the said firm of *Abey & Keely* have been sued on an indebtedness of said firm in the Court of Common Pleas of said county, and judgment obtained against them for 50 dollars and costs, and that upon an execution issued thereon, the plaintiff has been compelled to pay 39 dollars and 95 cents.

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There was a supplemental complaint filed, setting up that since the commencement of the suit the plaintiff had been compelled to pay a certain other sum; but inasmuch as it may be doubtful whether a sum paid by him since the commencement of the suit could be recovered in this action, we shall not notice any question arising on the supplemental complaint.

The defendant answered—

1. Admitting the execution of the contract, and not denying the recovery of the judgment and the payment by the plaintiff, as alleged in the complaint; but setting up for defense, that the plaintiff falsely and fraudulently represented to him that the firm of *Abey & Keely* were indebted to *Sears, Keith & Chapin* in the sum of 28 dollars and 61 cents only, and thereby induced the defendant to agree and assume to pay, jointly and severally with said *Keely*, all debts against the said firm, as specified in said agreement; whereas in fact the said firm of *Abey & Keely* were indebted to said *Sears, Keith & Chapin*, in the sum of 134 dollars and 5 cents, and the defendant was afterwards compelled to pay said *Sears, Keith & Chapin* the sum of 52 dollars, 72 cents over and above the sum so represented to be due them.

2. That the plaintiff falsely and fraudulently represented to the defendant that one *Thomas W. Vanhorn's* account to the said firm of *Abey & Keely* was 45 dollars and 46 cents, and thereby induced the defendant to purchase the interest of the said plaintiff in said account, and assume the payment of the debts of said firm, when in fact the said

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Vanhorn was only indebted to said firm of *Abey & Keely* in the sum of 28 dollars and 3 cents.

3. The defendant set up by way of counter-claim the said sum of 52 dollars and 72 cents, and also the sum of 9 dollars and 79 cents, represented to be the interest of the said *Abey* in the account of *Vanhorn* over and above what was due.

Issues were formed upon these answers, and the cause was tried by the Court. Finding for the defendant, motion for a new trial overruled, and judgment on the finding.

The cause for new trial chiefly relied upon, was that the finding was contrary to the evidence. Exception was duly taken to the decision overruling the motion for a new trial, and there was a bill of exceptions filed setting out the evidence.

The plaintiff produced in evidence the agreement mentioned in the complaint; a judgment in the Court of Common Pleas against the said firm of *Abey & Keely*, corresponding with that described in the complaint; an execution issued thereon; and proved payment by himself thereon of the said sum of 39 dollars and 95 cents.

This we think made out a *prima facie* case for the plaintiff; and it only remains to consider whether the defense set up was proven.

The only material facts proven by the defendant were, that an error existed on the books of said firm of *Abey & Keely*, showing that said firm was indebted to *Sears, Keith & Chapin* in the sum of 28 dollars and 31 cents, when in fact they owed said house the sum of 134 dollars and 5 cents, which error originated from a draft of 100 dollars having been charged to said house when it was sent, and again charged when the receipt of it was acknowledged; and also an error in reference to the account of *Vanhorn*—the books showing that said *Vanhorn* was indebted to the firm of *Abey & Keely* in the sum of 45 dollars, whereas he was only indebted in the sum of 28 dollars and 3 cents—which error originated in said *Vanhorn's* not having credit for a county order which he alleges to have paid on said account.

This is the substance of all the testimony in the case.

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There was no proof that *Abey* made any false and fraudulent representations, or any representations of any kind, in reference to the amount of the indebtedness of the firm of *Abey & Keely*, to *Sears, Keith & Chapin* or to any one else; nor was there any proof of any representations made by him in reference to the amount due the firm from *Van-horn* or any one else. On this point there is a total lack of proof. Neither is there any testimony showing that *Abey* had any knowledge of the errors on the books of the firm.

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It seems to us that the defense is not made out.

What *Abey* undertook to sell to *Bennett* was, all his right, title and interest to the stock of merchandize, notes and accounts, including the profits that had accrued in trade; and what *Bennett* agreed on his part to do was, to pay all the debts of the late firm and fully indemnify the said *Abey* against any liability for the same; and we think under such an agreement, a simple error on the books of the firm of *Abey & Keely*, showing that the firm was indebted less than it really was, or had more due it than it really had, in the absence of all fraud and misrepresentation, is not a matter that *Bennett* can set up in discharge of his liability on his part of the contract.

The law never presumes fraud, and the proof shows none. Had there been false representations made in reference to the items in which these mistakes existed, the case would be different. Indeed, in many cases, the suppression of the truth is as fraudulent as the suggestion of falsehood; and perhaps in this case, if while the parties were examining the books, with a view to the contract, the plaintiff, knowing the mistakes in the books, had fraudulently concealed the same, the defendant could set it up in bar of a recovery, but there is no evidence showing that he had any such knowledge; and a man cannot be said to conceal a fact, where he has no knowledge of its existence.

Were this a case of conflicting testimony, or were the matters of evidence involved in any doubt, we should be slow to reverse it; but as there was a total failure of proof

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THE STATE *Per Curiam.*—The judgment is reversed with costs.
v.
LONGLEY. Cause remanded for a new trial.

E. R. Wilson, C. Case and W. H. Withers, for the appellant.

J. P. Greer, for the appellee.

THE STATE v. LONGLEY.

Indictment in two counts against a constable for failing to pay over money. The first count charged a demand of the money by the execution-plaintiff, and a failure to pay to him. The second count charges a failure by the constable on the expiration of his term of office, to pay the money to the justice of the peace. The indictment was predicated upon the act of 1855.

Held 1. That by § 3, 2 R. S. p. 480, it was optional with the constable to pay the money over to either the execution-plaintiff or the justice, and the act of 1855 does not change the law.

2. That the first count was bad for not averring non-payment to the justice; and an averment in the count that the defendant then and there had the money, referring to the time when he collected it, does not aid the defect. The count should have alleged a failure to pay to either the justice or the execution-plaintiff.

3. That the second count was bad for not averring non-payment to the execution-plaintiff.

4. That each count in an indictment must be sufficient in itself; that averments in one count cannot aid defects in another.

Wednesday,
June 23.

APPEAL from the *Tippecanoe* Circuit Court.

WORDEN, J.—This was an indictment against the defendant for failing to pay over money collected by him as constable on an execution.

Upon motion of the defendant, the indictment was quashed; and the state appeals.

The indictment contains two counts. The first charges, in substance, that on the first of *October*, 1856, *Longley*, as constable, collected on an execution in his hands, issued upon a judgment in favor of *Cyrus B. James* against *God-*

love *O. Behm*, by *Thompson W. Graham*, a justice of the peace of *Tippecanoe* county, the sum of 15 dollars; that the said *Cyrus B. James* being then and there the proper person to receive said money, the same being then and there in the possession of said *Longley*, did, during the defendant's term of office as constable, to-wit, on the 15th day of *January*, 1857, require the defendant to pay over to him said money, but that the defendant fraudulently and unlawfully failed and refused to account for and pay over to said *James* said sum of money.

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The second count charges that the defendant, on the 15th day of *January*, 1857, as constable, collected from *Godlove O. Behm* 15 dollars, on an execution issued to him by *Thompson W. Graham*, a justice of the peace of *Tippecanoe* county, on a judgment against *Behm* in favor of *Cyrus B. James*; that the defendant's term of office as constable expired on the 15th of *April*, 1857; that on that day, the said justice was the proper person to receive said money; and that the defendant was legally bound to pay the same over to him, the same being in his possession; but that he then and there fraudulently and unlawfully failed and refused to account for and pay over said money to said justice.

The indictment is predicated upon an act of the legislature providing "that any sheriff, clerk, &c., constable, &c., who shall fraudulently fail or refuse, at the expiration of the term for which he was elected or appointed, or at any time during such term, when legally required by the proper person or authority to account for and pay over to such person or persons as may be lawfully entitled to receive the same, all moneys which may have come into his hands by virtue of his office, shall be deemed guilty of a felony, and upon conviction thereof upon indictment shall be imprisoned in the state prison," &c. Acts of 1855, p. 89.

The third section of the act defining the powers and duties of constables (2 R. S. p. 480), provides that it shall be the duty of a constable "to pay over to the proper plaintiff or to the proper justice, without delay, all money by him collected by virtue of any writ."

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This provision seems to render it optional with the constable to pay, either to the plaintiff or the justice of the peace.

The first count in the indictment is bad for not averring a non-payment by the defendant to the justice. It does not appear but that at the time of the demand upon him by the plaintiff in the execution, he had paid the money over to the justice, which he had a right to do. The averment in this count that the defendant then and there had the money in his possession, does not help the matter, as that has reference to the first of *October*, 1856, when defendant collected the money, as charged in this count, and not to the 15th of *January*, 1857, when the demand is alleged to have been made. Besides, if it was optional with the defendant to pay the money to either, he had a right to pay it to the justice upon a demand made by the plaintiff in the execution to pay it to himself, and if so, the indictment ought to allege that upon such demand the defendant failed or refused to pay to either.

The second count is based upon the idea that it is the duty of a constable upon the expiration of his term of office to pay over to the justice money which he may have collected on execution. We think the act of 1855, *supra*, does not at all alter the law of 1852, leaving it optional with the constable, upon the expiration of his term, to pay either to the plaintiff in the execution or to the justice. It simply provides for a failure to pay over to such person or persons as may be entitled to receive the same. The execution-plaintiff and the justice being entitled to receive the money, and the defendant having the right to pay to either, the count is bad for not averring a non-payment to the execution-plaintiff. This count avers that on the day of the expiration of the defendant's term of office, he had the money in his possession. This may be true, and yet on the same day he may, for ought that appears in the count, have paid it to the execution-plaintiff.

It may be remarked that each count in an indictment must be sufficient in itself, and that averments in one cannot aid defects in another. The averment in the first count

of the non-payment to the execution-plaintiff, cannot supply the want of such averment in the second; nor can the averment of non-payment to the justice in the second, supply the want of such averment in the first.

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Per Curiam.—The judgment is affirmed.

J. L. Miller, for the state.

G. S. Orth and *J. A. Stein*, for the appellee.

10	485
124	500
10	485
131	401
133	110
10	485
134	604

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The Supreme Court will not readily review the decision of an inferior Court in setting aside a verdict and granting a new trial.

A contract cannot be confessed and avoided, and also denied by alleging a different contract, in the same paragraph of the answer. Such allegation is surplusage.

It cannot be said that the market value of a commodity is peculiarly within the knowledge of one person more than another, as the channels of information are equally open to all; and a party to a contract of sale of a marketable commodity, has no right to rely upon the representations of the other party touching the market value of that commodity.

APPEAL from the *Fayette* Circuit Court.

Wednesday,
June 23.

WORDEN, J.—This action was commenced in the *Fayette* Common Pleas. Issues were made up, and the cause tried in that Court. A verdict was found for the plaintiff, *Cronk*, a new trial granted, and the cause transferred, by agreement of parties, to the Circuit Court for trial.

The complaint alleges that the plaintiff and defendant made a contract on the 24th of *October*, 1855, by which the defendant agreed to sell to the plaintiff what barley the defendant then had on hand, amounting to between four and six hundred bushels, to be delivered at *Cambridge City* within four weeks from that time, at 1 dollar per bushel; that the plaintiff agreed to buy and did buy said barley at the price named, and paid the defendant thereon 10 dollars, and 1 dollar for transportation, which the defendant received and accepted on said contract; that the plaintiff

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was ready to receive the barley at the time and place specified, and to pay for the same, but the defendant failed and refused to deliver the same or any part thereof; that the plaintiff duly demanded the barley at the time and place it was to have been delivered, and that it was then worth 1 dollar and 60 cents per bushel; wherefore, &c.

To this complaint the defendant answered—

1. By a general denial.

2. As follows, viz.: “ And for a further defense, said defendant says that heretofore, to-wit, on the 25th of *October*, 1855, at said county, said plaintiff, *Gentleman*, dealer in barley, &c., called on said defendant and represented to him that he, the plaintiff, was engaged in the business of a brewer in *Connersville*, in the state of *Ohio*, and desired to purchase barley to ship to that place for his own use, and to induce the defendant to contract his barley to him, the plaintiff, as hereinafter stated, he, the plaintiff, falsely, and with the design to impose upon the defendant, and deceive and defraud him, defendant being ignorant of the price of barley in *Cincinnati*, stated that barley was selling in *Cincinnati* at 1 dollar and 10 cents per bushel, the price at which place governes the price in *Fayette* county, and then and there offered the defendant 1 dollar per bushel, whereupon the defendant said that if barley was selling at 1 dollar and 10 cents per bushel in *Cincinnati*, 1 dollar was as much as the plaintiff could afford to pay him, the defendant, for his barley, as the shipping would cost 10 cents per bushel; and the plaintiff again declared that barley was selling for 1 dollar and 10 cents in the city of *Cincinnati*, whereupon the defendant told him if the price of barley was 1 dollar and 10 cents only in *Cincinnati*, he might have his barley at 1 dollar per bushel, to be delivered at *Cambridge City*; that he did not know how much there was of it, but what he, defendant, had to spare the plaintiff should have, as aforesaid. But the defendant avers that it was false that barley was selling in *Cincinnati* at said time, to-wit, on the 25th of *October*, 1855, at 1 dollar and 10 cents per bushel, but that the truth is, the price of barley at said time in the city of *Cincinnati* was 1 dollar and 50 cents

per bushel, and which the said plaintiff well knew, and with the intent to cheat and defraud the said defendant made said misrepresentations, and the defendant confiding in the same, and with the understanding, and on the condition, that the price of barley was but 1 dollar and 10 cents in *Cincinnati*, accepted the offer of the plaintiff, as aforesaid. And said defendant says that afterwards, to-wit, on the — day of *October*, 1855, the said defendant tendered to said plaintiff said sum of 11 dollars, and informed him that he, the defendant, did not consider himself bound by his engagements aforesaid, because of the false and fraudulent representations of the said plaintiff, and the said defendant now brings said money into Court; wherefore he demands judgment for costs," &c.

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To this paragraph of the answer, a demurrer was filed, assigning for cause that the same does not contain facts sufficient to constitute a defense to the action; but the demurrer was overruled and exception taken. The plaintiff then took issue, and the defendant withdrew his general denial, and the cause was tried by a jury on the issue joined upon the paragraph of the answer above set out. Verdict for the defendant; motion for a new trial overruled; and judgment on the verdict.

Amongst other things, it is assigned for error that the Court below set aside the first verdict, on the motion of the defendant, and granted a new trial.

In this we can see no error that would authorize us to reverse the judgment. In *Powell v. Grimes et al.*, 8 Ind. R. 252, it is said: "This Court would very reluctantly set aside the granting of a new trial. Perhaps a case might occur in which it would do it; but where the Court below conducting the trial, is not satisfied with its fairness, we should be slow to differ with it." We suppose the motion was granted on the evidence adduced on the trial, upon an examination of which, we see no sufficient reason to disturb the action of the Court below in that respect.

Did the Court below err in overruling the demurrer to the second paragraph of the answer?

In order to answer this question it is necessary to deter-

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mine the character of the paragraph. In its main scope and design, it seems to be affirmative in its character, setting up in avoidance of the contract, the false and fraudulent representations of the plaintiff. We regard it as being pleaded by way of confession and avoidance, although there is an allegation in it, that the defendant, confiding in the representations made, "and with the understanding and on the condition that the price of barley was but 1 dollar and 10 cents in *Cincinnati*, accepted the offer of the plaintiff. This statement as to the conditional character of the contract, amounts simply to a denial that the defendant made the contract set up in the complaint, which was absolute, and not conditional, and we think it should be regarded as surplusage, being inconsistent with the main design of the paragraph, which is to set up the fraud in avoidance of the contract. The contract cannot be confessed and avoided, and also denied in the same paragraph of the answer.

Regarding the paragraph as setting up the fraud merely, in avoidance of the contract, the question arises whether the facts set up are sufficient to bar the action. We think they are not.

In Chitty on Contracts, p. 681, it is said, in treating of such frauds as will avoid a contract, that "it is extremely difficult to advance any general principle, or elementary doctrine on the subject. Cases of fraud depend peculiarly on the particular facts which have occurred, the relative situation of the parties, and their means of information. On the one hand, Courts have endeavored to repress dishonesty; on the other hand, they have required and expected that each party shall be vigilant, and exercise a due degree of caution. *Vigilantibus, et non dormientibus succurrant jura*. It is difficult to imagine that a general misrepresentation as to value, &c., the truth of which a party has an opportunity of ascertaining—or the concealment of a matter which an individual of ordinary sense, vigilance or skill, might discover,—can, in law, constitute fraud."

In 2 Kent's Com. p. 484, it is said that "the common law affords to every one reasonable protection against fraud

in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information.”

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A knowledge of the value of barley in *Cincinnati* at the time of making the contract, was equally accessible to both parties. It cannot be said that the market value of a commodity is peculiarly within the knowledge of one more than another, as the channels of information are open equally to all; and we think a due degree of caution and diligence, applying to “the ordinary and accessible means of information,” would enable a party to act and make his contracts understandingly, and therefore, that he has no right to rely upon representations of such character.

In 2 Parsons on Contracts, p. 270, it is said that “it must appear that the injured party not only did in fact rely upon the fraudulent statement, but had a right to rely upon it, in the full belief of its truth; for otherwise it was his own fault or folly, and he cannot ask of the law to relieve him from the consequences.”

There are decided cases that in principle seem to be directly in point. In citing one, Chancellor KENT says: “The cases have gone so far as to hold, that if the seller should even falsely affirm that a particular sum had been bid by others for the property, by which means the purchaser was induced to buy, and was deceived as to the value, no relief was to be afforded; for the buyer should have informed himself from proper sources, of the value, and it was his own folly to repose on such assertions, made by a person whose interest might so readily prompt him to invest the property with exaggerated value.” 2 Kent’s Com. p. 486.

In *Bailey v. Merrill*, 3 Bulstr. 94, a carrier brought an action for deceit, for representing that a load weighed only 8 cwt., when in fact it weighed 20 cwt., whereby two of his horses were killed. Judgment was arrested, because the carrier might have weighed the load himself.

Moore v. Turbeville, 2 Bibb, 602, was this: The plaintiff had given the defendant an obligation to deliver him a

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negro man equal in value to a negro man by the name of *Moses*, belonging to *James M'Callister*. At the time of executing the obligation, the plaintiff knew nothing of *Moses*, or his value. The defendant well knowing the value of *Moses*, artfully, deceitfully, and with the intent to induce the plaintiff to enter into the contract, represented to him that *Moses* was at most, not worth more than 450 dollars. The plaintiff, relying with confidence on the representation, was thereby induced to enter into the obligation. The plaintiff tendered to defendant a negro man equal in value to *Moses*, according to defendant's representation of him; but the defendant refused to accept him on the ground that he was of less value than *Moses*. The defendant sued plaintiff on the obligation, and gave in evidence that *Moses* was worth 500 dollars, and recovered that sum, whereupon this suit was brought to recover for the false and fraudulent representations as to the value of *Moses*. The Court say in the case—"The law does not deny its aid in such case, because it looks upon a want of candor and sincerity with indulgence, but because it will not encourage that indolence and inattention which are no less pernicious to the interests of society. A diligent attention to our own concerns, as well as good faith to others, is a virtue; and the law, while it recognizes the rules which tend to preserve the latter, at the same time is careful to guard the principles which prompt to the exercise of the former. With respect to points plainly within the reach of every man's observation and judgment, and where an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence. To one thus supinely inattentive to his own concerns, and improvidently and credulously confiding in the naked and interested assertions of another, the maxim, "*vigilantibus non dormientibus, jura subveniunt*," emphatically applies, and opposes an insuperable objection to his obtaining the aid of the law. The ignorance of the plaintiff in this case in respect to the value of *Moses*, adds no strength to his claim. *Moses* belonged to a third person, and for ought

that appears was as accessible to the plaintiff as to the defendant." *Held*, in the case, that the declaration contained no cause of action.

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A misrepresentation as to the legal effect of an instrument signed by a party, cannot be set up to avoid the instrument. *Russell v. Branham*, 8 Blackf. 277.—*Lewis v. Jones*, 4 B. & C. 506. In the case last cited, BAYLEY, J., remarks that "every man is supposed to know the legal effect of an instrument which he signs; and this must be taken to be a representation as to a fact within the knowledge of the creditor, and such misrepresentation will not have the effect of avoiding this instrument, because it was not calculated to mislead the creditor." Now, we apprehend that the reason why every man is presumed to know the law, and therefore to know the legal effect of an instrument signed by him, is that the channels of information in that respect are accessible, alike to him as to others. We know, as a matter of fact, that in a great many instances, men sign instruments without knowing precisely their legal effect, but if they do so relying upon a representation, without availing themselves of the sources of correct information, it is their own folly, and the law will not relieve them. The same principle applies with reference to the value of a commodity or article of commerce, in market. These are matters of general notoriety, upon which correct information can be obtained, and one man can as well avail himself of the sources of information as another; and we think if he chooses to rely blindly upon a representation, rather than to inform himself, the law will not, because he was deceived, permit him to avoid his contract thus blindly entered into. In the case of *Foley v. Cowgill*, 5 Blackf. 18, DEWEY, J., observes that, "however much the moralist may censure the address some times resorted to by men of keen business habits, to effect advantageous contracts, misrepresentations as to the value or quantity of a commodity in market, when correct information on those subjects is equally within the power of both contracting parties, with equal diligence, do not, in contemplation of law, constitute fraud."

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There may be circumstances which would render a representation of the kind alleged fraudulent; but no such circumstances are shown in the paragraph under consideration.

Per Curiam.—The judgment is reversed with costs. Cause remanded for further proceedings not inconsistent with the opinion.

B. F. Claypool, for the appellant.

N. Trusler, G. Trusler and S. Heron, for the appellee.

HOWE v. THE STATE.

A person is not liable to a criminal prosecution for destroying timber on lands of which he holds possession by virtue of a fraudulent contract of purchase.

Wednesday,
June 23.

APPEAL from the *Allen* Circuit Court.

HANNA, J.—This was an indictment found at the *February* term, 1853, of the *Allen* Circuit Court.

The first error assigned is, that the Circuit Court had no jurisdiction. This has already been several times decided by this Court. *Lawrie v. The State*, 5 Ind. R. 525. —*Id.* 162.—*Id.* 212.

The next point is, that improper evidence was admitted on the part of the state. The bill of exceptions is, that the Court “permitted the state to introduce further evidence tending to show that defendant procured said contract from said *Jenks* by fraud.” This indictment was for cutting trees upon the lands of another. The defendant had given evidence tending to show that he held and occupied said lands by a written agreement between one *Jenks* and himself to purchase the same; and as rebutting this, the Court permitted evidence, as above stated, to be given.

Is a man liable to a criminal prosecution for a trespass, for destroying timber upon lands which he holds possession of by virtue of a contract obtained by fraud?

We think that a criminal prosecution cannot be maintained under the circumstances involved in this case. If any other ruling was to prevail, a man might be liable to prosecutions for acts committed whilst in the possession of lands under contracts declared fraudulent at the end of a long and doubtful law-suit, in the nature of a chancery proceeding. *Regina v. Dodson*, 9 Ad. & El. 704.—*Goforth v. The State*, 8 Humph. 37.—*Dye v. The Commonwealth*, 7 Grattan, 662.

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Per Curiam.—The judgment is reversed.

D. H. Colerick, for the appellant.

D. C. Chipman and *J. W. Gordon*, for the state.

RAMSEY and Another v. Foy.

Statutes in restraint of personal liberty must be strictly construed, with reference to the current of judicial decision, and to the practice existing at the time of and before their adoption.

In the practice under the statute of 1852 touching the proceedings upon the writ in the nature of a *ne exeat regno*, a complaint, showing a *prima facie* case, as well as an affidavit and a bond, must be filed before the order of arrest can issue.

If such writ issue without a complaint having been filed, it should be quashed. But in this case, no motion was made to quash the writ; and the jury found specially that the defendants did not intend to leave the state, &c.; that the debt was not due when the proceeding was commenced, but that it was due at the time of the verdict. *Held*, that the writ should have been set aside and the defendants discharged on the return of the verdict—which, in the absence of an appearance, would leave the case standing as if a complaint had been filed and no process issued, to be continued of course.

But the defendants in this case having appeared, a judgment on the verdict for the amount found due, was affirmed.

APPEAL from the *Miami* Court of Common Pleas.

Wednesday,
June 23.

HANNA, J.—On the 8th day of *May*, 1855, *Foy* filed his complaint on a note executed by the appellants to him on the 29th day of *October*, 1853, and due twenty months after date. The note was not then due; but the complaint

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was in the usual form, and did not contain any allegation that the defendants were about to leave the state, &c.

The agent of *Foy*, also, at the same time, filed his affidavit containing the allegation that the defendants were about to leave the state without performing or making provision for the performance of the contract, &c.; and obtained a writ of *ne exeat*, upon which the appellants were arrested and gave special bail.

At the next term of the Court commencing on the second day of *July*, the defendants demurred to the complaint, and assigned for cause that it did not contain facts sufficient, &c. The demurrer was overruled.

The defendants thereupon filed what they call their answer to the affidavit of the plaintiff. That answer admits that at the time of the issuing the writ in the case, they were indebted to the plaintiff in the sum of 837 dollars and 28 cents, by note dated *October 29*, 1853, and due twenty months after date. But they denied that they were about to leave the state, &c., and also denied fraud, &c.

No other process issued except the order of arrest.

A jury was empannelled to try the issues joined. They returned no general verdict, but found upon certain points or questions submitted to them, which were as follows:

“Were *Henry B.* and *Robert Ramsey* on the 8th day of *May* last, about to leave the state of *Indiana* without performing or making provision for the performance of the contract entered into with *Phineas Foy*, taking with them property, money, credits or effects subject to execution, with intent to defraud the plaintiff *Foy*?” Answer, “No.”

Were *Henry B.* and *Robert Ramsey* indebted to *Phineas Foy*, on the 8th day of *May*, 1855, the amount of a note for 837 dollars and 28 cents, or any part thereof? If so how much?” Answer, “No.”

“Do *Henry B.* and *Robert Ramsey* now owe *Phineas Foy* the amount of a note presented in this case, or any part thereof? If so how much?” Answer, “Yes; their indebtedness on said note, being the note sued on, now amounts, with interest, to the sum of 838 dollars and 34 cents.”

Upon this, the defendants moved to dismiss the cause, which motion was overruled.

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The defendants then made a motion for a new trial, which was also overruled, and judgment rendered for the plaintiff for 838 dollars and 34 cents, and against him for costs.

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Three errors are assigned—

1. In reference to overruling the demurrer.
2. Upon the refusal to dismiss.
3. In regard to the rendition of judgment upon the verdict.

It is argued that to authorize the order for arrest, upon a debt not due, the complaint ought to contain the necessary averments not only to show the indebtedness, but also to show that the defendants were about to leave the state without performing or making provision for the performance of the contract, taking with them property, &c., subject to execution, with intent to defraud the plaintiff.

The present statute upon the subject is extremely indefinite, and leaves much room for construction as to the proper practice under it. To determine that practice, it is necessary to advert for a moment to the former practice and legislation governing writs of *ne exeat*.

In *England*, this writ was originally a state writ; and the use of it in civil suits appears to have been confined to chancery proceedings, in which it was resorted to to prevent the party from departing without the realm, taking with him property, unless he first secured the performance of such order as the Court might make in the suit pending. It was issued only upon bill first filed, and could not be made use of where the demand was entirely at law, or upon agreements the time for the performance of which had not expired. 1 Black. Com. 266, n. 20.—2 Kent's Com. 31, 32.—2 Story's Eq. Juris. §§ 1470 to 1475.

By our revision of 1824, regulating the practice in chancery, "the Court in term time, or the circuit judge, or the two associates in presence of each other, in vacation," were authorized to grant the writ, after bill filed, supported by oath, and bond given in such sum as should be ordered by

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the Court or judge; and if the defendant, by answer or otherwise, satisfied the Court that there was no reason for his being restrained, or if he gave surety for the performance of the decree, the writ could be discharged. R. S. 1824, p. 288. The same provisions were continued in the next revision. R. S. 1831, p. 396.

By an act approved *February* 17, 1838, a change was made, so as to authorize the granting of the writ as well where the debt was not due as where it was due; and it was not necessary that the demand should be of a purely equitable character. There had to be a bill or petition and a bond filed, and an affidavit of the truth, &c. The writ was issued on the order of the Court, or president, or two associate judges, and the amount of bail required was fixed by such officer, &c. It was returnable in the Circuit Court, and contained a summons to the defendant to appear in the Court and answer the bill. Upon service and return, the Court proceeded to hear the case as other chancery cases, if the time for performance of the duty, &c., of the defendant had expired; but the Court might, nevertheless, proceed to determine whether the said writ ought not to be quashed. R. S. 1838, pp. 417, 441.

There was no provision inserted in the revision of 1843 authorizing such writ.

In 1847, an act was passed very similar to that of 1838 in many of its features, but containing the additional provision that the writ should issue only for debts or demands not actually due, and the bill or petition must allege that the defendant was about to leave the state, taking with him property subject to execution, or money, &c., with intent to defraud the plaintiff. An affidavit of the truth, &c., was also made. This act also contained a provision that the plaintiff should prove to the satisfaction of the Court or jury all the material matters alleged in the affidavit. Acts of 1847, p. 81.

These additional provisions were inserted in the act of 1847, we suppose, that it might conform to the act abolishing imprisonment for debt. Acts of 1842, p. 68.

This had been the history of the legislation in this state

upon the subject, from 1824 until the taking effect of the statute upon which this proceeding is based.

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It appears, then, by all the statutes referred to, that the writ issued, or was ordered, by the Court or a judge, and the bond to be executed by the plaintiff, or the security exacted from the defendant, was taken and approved by the judge, or the amount thereof by him fixed; and further, that the writ was discharged if by the answer, or otherwise, the defendant satisfied the Court that he ought not to be restrained; and that it was not granted except upon bill or petition and affidavit filed.

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The present statute is this: "Actions may be commenced upon any agreement in writing, before the time for the performance of the contract expires, when the plaintiff or his agent shall make and file an affidavit with the clerk of the proper Court, that the defendant is about to leave the state without performing," &c., and taking with him property, &c., with intent to defraud the plaintiff. 2 R. S. p. 185. The next section, upon such affidavit being filed, gives the clerk power to issue an order of arrest and bail, directed to the sheriff, "which shall be issued, served and returned, in all respects, as such orders in other cases." The plaintiff files a bond, which the clerk approves, &c.

It is thus apparent that the original purpose of the writ of *ne exeat regno*, is altogether lost sight of, in the change of practice and legislation upon the subject. Upon being no longer resorted to as a writ in favor of the state, it was used in aid of proceedings in chancery, to secure the performance of such orders and decrees as might be made in a suit pending; and from that it was made to apply to debts, demands, or agreements, whether due or not, and whether purely equitable or not; and now, it applies only, as regulated by this statute, to agreements in writing, the time for the performance of which has not expired. And from requiring the writ to be issued by the Court, or a judge, and the bail to be fixed by him, the legislation has been such as to now confer upon a mere clerk this power of issuing the writ and approving the bond, &c.; and thus, without even being required to possess judicial knowledge,

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a clerk holds the power to deprive a citizen of his liberty because of his alleged indebtedness.

Every statute in restraint of personal liberty, ought to be strictly construed, and construed too with reference to the current of decisions, and the usual practice which existed at the time of, and before, its adoption.

Keeping in view this principle, in considering this statute, we are of opinion that in the practice under it, a complaint in conformity therewith should be filed by the plaintiff, as well as an affidavit and bond; and that, therefore, the writ in the case at bar was irregularly issued, and, if a motion had been made, should have been quashed. In this we are strengthened by a strict construction of the first sentence of the statute quoted, when considered with other statutes. "Actions may be commenced," &c. Now, it is provided generally that a civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon. 2 R. S, p. 35. Then, to commence an action, not only must a complaint be filed, but a summons issue. We think the provisions must be construed together, for the writ is to issue, be served and returned, as in other cases, and there is no other case in which an order of arrest can issue before a complaint has been filed. Then, if the complaint must be filed, it should certainly make a *prima facie* case, to deprive a man of his liberty. Otherwise, the writ should not issue, or if issued, should be quashed.

In the case at bar, no motion having been made to quash the writ, it should have been set aside, and the defendants discharged from it, upon the return of the finding of the jury; and the case would then have stood as if the complaint had been filed and no process thereon issued, and would have been continued, of course, for process, but for the appearance of the defendants. This appearance is shown by the record to have been full, first, by filing a demurrer, which was properly overruled, because when filed the time for the performance of the contract was past and the complaint was sufficient to authorize a judgment for the amount due on the note, although insufficient to jus-

tify an arrest, &c.; and, secondly, by filing an answer in the form it was—admitting that the note sued on was at the time of the appearance and answer due and owing.

Per Curiam.—The judgment might, perhaps, have carried a part of the costs; but as there are no cross-errors assigned, the judgment will be affirmed, with 1 per cent. damages and costs.

J. A. Beal, for the appellants.

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THE NEW ALBANY AND SALEM RAILROAD COMPANY v.
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An agreement by a railroad company to cross a stream north of a certain street, requires them to cross the stream where a northerly line from such street would intersect it.

Conditional subscriptions of railroad stock may be valid.

Upon the acceptance of a conditional subscription by the entry thereof by the company upon the record, the contract of subscription is complete and absolute, and the subscriber is a stockholder; and no notice from the company is necessary before bringing suit upon the subscription.

But if notice of the location according to the conditions were necessary, an agreement that the kind of notice named in the contract should be sufficient would not render invalid any other kind of notice which might be in itself sufficient in point of fact.

If the stockholder be a resident of a town or city the construction and operation of the road through such town or city would ordinarily be sufficient notice.

No tender of a certificate of stock is necessary before suit brought. Such certificate does not constitute the title to the stock. The registry of the stockholder's name upon the stock-book of the company, opposite the number of his shares, gives him his title.

APPEAL from the *Tippecanoe* Circuit Court.

Wednesday,
June 23.

PERKINS, J.—Suit by the *New Albany and Salem Railroad Company*, commenced on the 28th of *September*, 1855, against *John McCormick*, upon a subscription of stock as follows:

“We, the undersigned, promise to pay the *New Albany and Salem Railroad Company*, the sum of 50 dollars for

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each share of stock set opposite to our respective names, provided said railroad company shall locate said railroad through the town of *Lafayette*, and cross the *Wabash River* north of *Brown* street in said town. Said stock to be paid out in installments of twenty-five per centum every six months, after the location of said road through said town of *Lafayette*. Such location and the date thereof to be sufficiently evidenced by an order of the board of directors of said company accepting the following subscriptions, on the terms above named.

"Dated *Lafayette*, June 17, 1852.

Names.	Number of Shares.	Amount.
<i>John McCormick</i> ,	20	1,000 dollars."

The complaint alleged compliance, &c., by the company. Answer, a general denial.

The case was submitted, upon an agreed statement of facts, to the Court. Finding and judgment for the defendant, overruling the plaintiff's motion for a new trial. The points are all shown by the exceptions taken.

The facts agreed upon are as follows:

"*First*.—The defendant, then and now a resident of *Lafayette, Indiana*, on the 17th day of *June*, 1852, subscribed a written agreement for twenty shares of stock, a copy of which is made a part of the amended complaint; the stock remains unpaid.

"*Secondly*.—At the time of the signing of said agreement by the defendant, the plaintiff, under her charter, was engaged in the construction of a railroad from *New Albany*, by the way of *Salem*, to *Michigan City*.

"*Thirdly*.—On the 14th day of *July*, 1852, the directors of the railroad company passed an order and entered it on their records in the words following: 'Ordered by the board, that the subscriptions of stock made at *Lafayette*, be and they hereby are accepted;' but the passage of this order was not communicated to the defendant, nor had he any knowledge thereof, until after suit brought.

"*Fourthly*.—The plaintiff, in the fall of 1852, located, and in the winter, spring and summer of 1853 constructed, her railroad through *Lafayette*, and crossed the *Wabash River*

at a point three miles due north of *Lafayette*, and not within the town, and has ever since maintained and operated said road. No formal notice of such location or construction was ever given defendant.

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“*Fifthly*.—The plaintiff did not at any time, tender or offer to give the defendant a certificate of stock before the trial of this cause, upon the payment of his subscription.”

1. The agreement, in this case, to cross the *Wabash River* north of *Brown* street in *Lafayette*, required the company to cross that stream where a northerly line from said street would strike it. And it was not necessary to cross in the city of *Lafayette* unless such line struck the river within the city.

2. Conditional subscriptions of railroad stock may be valid. *Clem v. The Newcastle, &c., Co.*, 9 Ind. R. 488.

3. On the acceptance of the subscription in this case, by the entry thereof made by the company on their record, the contract of subscription became complete and absolute, and the subscriber became a stockholder. *Kentucky Mutual Ins. Co. v. Jenks*, 5 Ind. R. 96.—Redf. Railw. 98.

4. It would seem that, such being the case, no notice from the company was necessary before suit brought upon the subscription. *Ross v. The Lafayette, &c., Co.*, 6 Ind. R. 297.

5. But if notice of the location was necessary, the agreement that the kind of notice named in the contract should be sufficient, did not render invalid any other kind that might also be in itself sufficient in point of fact. *Hankins v. Shoup et al.* 2 Ind. R. 342. And as *McCormick* was an actual resident of *Lafayette*, a compactly built city of not more than 15,000 inhabitants, the constructing and operating of the road for a period of between two and three years after his subscription, before suit upon it, was sufficient notice to him, in point of fact, of the location of the road through said city. The contract required no notice that installments were due and required to be paid. See *Ross v. The Lafayette, &c. Co.*, *supra*.

6. No tender of a certificate of stock was necessary. Such certificate does not constitute the title of the stock-

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holder to his stock. The registry of his name upon the stock-book of the company, opposite the number of his shares, gives him title to his stock. That book, as a member of the corporation, he has at all times a right to inspect. To that book reference is had in paying dividends, in receiving votes at corporation elections; upon that book transfers of stock, as between the company and the owner, are made; and of it, copies are given to stockholders. Redf. Railw. 43.

Certificates of stock can always be demanded and obtained by the owners, when they may desire them. They are convenient, as evidences of stock existing upon the proper book, in making sale of stock to third persons, but are not indispensable. Redf. on Railw. 50.—Ang. & Ames on Corp. 411. When a subscriber pays an installment of stock he should have a receipt of payment.

Per Curiam.—The judgment is reversed with costs. Cause remanded with instructions to enter judgment upon the agreed case for the plaintiff.

H. W. Chase and J. A. Wilstach, for the appellants.

W. C. Wilson and G. Gardner, for the appellee.

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THE SAME v. BRANDON.

THE SAME v. HUGHES.

Wednesday,
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ON APPEAL from *Decatur* Court of Common Pleas.

Per Curiam.—These were suits to recover for stock killed upon a railroad which was not fenced. The defense set up was, that the owner of the stock was not the owner of lands adjacent to the road, &c.

It has been decided in the case of *The Indianapolis and*

Cincinnati Railroad Company v. Townsend, at the November term, 1857 (1), that such a state of facts is not a good defense. See, also, 3 Kernan, 42. May Term,
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The judgment in each case is affirmed with 5 per cent. damages and costs. WILLIAMS
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J. S. Scobey and *W. Cumback*, for the appellants.

J. Gavin and *O. B. Hord*, for the appellees.

(1) *Ante*, 38.

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At common law, the jury were, in criminal cases, the exclusive judges of the evidence; but they were bound to believe the law to be as the Court stated it in the charge.

But the constitution of 1851 (art. 1, § 19), changed the rule; the jury are now the exclusive judges of the law and the evidence.

APPEAL from the *Monroe* Circuit Court.

DAVISON, J.—Indictment for grand larceny. Verdict against the defendant; upon which the Court, having refused a new trial, rendered judgment.

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The evidence being closed, the defendant moved to instruct the jury as follows:

“By the constitution of this state, the jury in criminal cases are the judges both of the law and the facts.”

This instruction was refused; but the Court gave the following:

“You are the exclusive judges of the evidence, and may determine the law; but it is as much your duty to believe the law to be as charged to you by the Court, as it is your sworn duty to determine the evidence.”

Whether, at common law, the jury in criminal cases are the judges of the law of the case, is a question which has been often before this Court; and it must be conceded that its adjudications on the subject are not uniform.

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Townsend v. The State, 2 Blackf. 151, decides that the jury are the judges of the facts, both in civil and criminal cases, but that they are not, in either, the judges of the law; that they are bound to find the law as propounded by the Court; and though they may find a general verdict, including both the law and the facts, still, if in such verdict they find the law contrary to the instructions of the Court, they thereby violate their oath.

But this decision is, in effect, overruled by *Warren v. The State*, 4 Blackf. 150. There, the Court held affirmatively that, in an indictment for larceny, the jury have the right to determine the law as well as the facts of the case.

In *Carter v. The State*, 2 Ind. R. 617, the Circuit Court had charged that the jury were the judges of the law and the facts; but that it was their duty to believe the law to be as laid down by the Court. This charge was sustained; and in the opinion delivered, the Court say: "Taken altogether, the instruction expresses the law. It informs the jury that it is in their power to find a general verdict or guilty or not guilty, as they please, upon the whole case, and at the same time admonishes them that duty dictates that they should take the law from the Court." The position thus assumed is substantially the same as that taken in *Townsend v. The State*, viz., that the jury, though they may find a general verdict including both the law and the facts, are still bound in duty—which means their duty as jurors—their sworn duty—to find the law as propounded to them by the Court.

This exposition is no doubt correct. Mr. *Wharton*, in his treatise on Criminal Law, says: "In *England*, it has always been held that the Court were as much the judges of law in criminal as in civil cases, with the qualification that owing to the peculiar doctrine of *autrefois acquit*, a criminal acquitted could not be overhauled."

And in this country the same rule of decision is sustained by a weight of authority which seems to be conclusive. *United States v. Battiste*, 2 Sumner, 243.—*Commonwealth v. Porter*, 10 Met. 262.—*Pierce v. The State*, 13 N. Hamp. R. 536.—*Carpenter v. The People*, 8 Barb. 603.

But the question before us does not rest upon common-law rule. The constitution (art. 1, § 19), says: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Hence, it will at once be seen that the jury, in the cases to which the section refers, are now at liberty to settle the law for themselves; and the result is, that an instruction of the Court in any degree tending to impair their right so to determine the law, would be objectionable; because the party accused has an undoubted right to have the law of his case settled in accordance with the established rules of criminal procedure.

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How, then, stands the case upon the record? The jury were told—"You are the exclusive judges of the evidence, and may determine the law." Thus far, the instruction, in effect, concedes their right to adjudge the law; but its concluding branch, viz., "It is as much your duty to believe the law to be as charged to you by the Court, as it is your sworn duty to determine the evidence,"—renders the instruction erroneous; because the whole, taken together, states the common-law rule which, as we have shown, is in direct conflict with § 19, art. 1, of the constitution.

Evidently it was not, in the sense of the instruction, their duty to believe the law as charged by the Court—otherwise they could have had no right to determine it themselves. The instruction cannot be sustained.

But we have a statute which requires the Court, in its charge to the jury in criminal cases, to state "all matters of law necessary for their information in giving their verdict." 2 R. S. p. 376. It is insisted that this enactment conflicts with the constitution; but we are not of that opinion. It simply confers upon the Court an advisory power—directs the judge to inform the jury as to the law of the case; and though it may be their duty to respect and give due consideration to the opinion of the Court on questions of law applicable to the facts proved, still the statute does not, either in terms or by implication, deprive the jury of their right, under the constitution, to determine the law.

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HANNA, J.—In the opinion pronounced by the Court, in this case, I cannot concur, for the reason that it is in my opinion calculated to subvert the system of jurisprudence which has heretofore prevailed in this state, and defeat the ends of justice.

The decision is, in effect, placing in the hands of a jury the unlimited and unrestrained power to find a defendant guilty or not guilty, without regard to law or evidence. This is stating the case strongly, but no stronger than the conclusion arrived at by the Court will warrant. And still more, in cases of improper convictions, the presiding judge would yet have the right, until it is decided otherwise, to grant new trials, whilst, upon an improper acquittal, there is no redress for violated law. Law is said by writers to be a rule of action. It should be fixed, then. If each jury decide for themselves what the law is, there can be no fixed rule—no rule at all—upon any subject. The decisions will vary according to the views of different juries.

In the case at bar, the instruction now held to be erroneous is as follows:

“ You are the exclusive judges of the evidence, and may determine the law; but it is as much your duty to believe the law to be as charged to you by the Court, as it is your sworn duty to determine the evidence.”

The first branch of this instruction embodies the statutory and constitutional rights of the jury, to-wit, that they are the exclusive judges of the evidence—of all questions of fact (2 R. S. p. 376, § 113)—and that they may determine the law. Constitution, art. 1, § 19. The latter branch of the instruction, it is assumed, limits them in the exercise of the right, in the full extent to which by the constitution they are authorized to exercise it, in determining upon the law. Let us see whether the language used will bear that construction. The jury were informed that it was as much their duty to believe the law to be as charged by the

Court, as it was their sworn duty to decide upon the evidence. Now, they had just been told that they had full power to determine upon the evidence—that they were the exclusive judges thereof. This evidence they received from the witnesses, and might give greater credit to one than another—might credit or discredit a particular witness. So, just the same legal exercise of judgment and discrimination that was used in determining upon the weight that should be given to the testimony of particular witnesses, was in like manner to be exercised in weighing the instructions given by the Court—no more, no less. They might believe the witnesses or disbelieve them; but certainly it was their duty to believe each one had sworn honestly and truly, if they could reconcile it with their conscience and the other testimony to so believe. Precisely to the same extent, they were called upon to believe that the tribunal, whose duty it was to give them the law in charge, had done so properly and correctly. The Court did not say to them that they were absolutely to take the law from the Court, but that in considering the case it was as much their duty to believe that the Court had correctly stated the principles of law governing that case, as it was their duty to believe that witnesses had correctly stated the facts. This was subservient, too, to the general statement which had, in the same sentence, been made to them—that they were the exclusive judges of those facts, and might determine the law. How determine it? Determine it after giving due weight to the charge of the Court as to what that law was. Not that they had the right to disregard such instructions, without having first weighed and considered them—not that they had the right to cast aside any portion of the testimony, without weighing and considering it; but that it was alike their duty to consider the testimony, as detailed by the witnesses, and the charges, as given by the Court; because it was the duty of the one to give the testimony, and of the other to charge the law. They might, after such consideration, say, “this testimony is not evidence;” and, perhaps, might say, “this charge is the law, but is not applicable to the facts proved in the case.” But it is a ruling

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that may possibly lead to unfortunate results, to hold, even in effect, that a jury can, without investigation, cast aside the one, or disregard the other.

When a man is indicted, he has a right to a speedy and fair trial, according to the known and long-established rules of law governing in such cases, and he should not be tried by any other standard; a jury should not be at liberty to shorten or lengthen it, either in requiring more or less evidence, as their whim or caprice may dictate, or by laying down unwholesome legal principles. The safety of every citizen demands this. A jury may return a verdict of guilty, without giving a reason therefor, and such verdict may be, by them, based upon an entirely wrong construction of the law. Where would be the remedy? How could you know what operated upon their minds? The Court may lay down the law in a charge. Counsel may except, and if the charge is wrong have the benefit of the exception. But if the jury are to be the sole arbiters, they may wrongfully lay down the law in a secret jury room, convict the defendant, and cause him to be executed—executed for the reason that the whole case might properly turn upon the conclusion of the jury as to a doubtful state of facts—and a new trial might be refused by the Court, under the supposition that such doubtful state of facts had been found against him by the jury, and, without knowing that such point of fact was found in his favor, but a wrong conclusion as to the *law* arrived at by them in their secret conference.

It would appear that a plain statement of a case, properly involved in this decision, ought to refute the position taken. Suppose a jury should return a verdict of guilty against a man accused of a heinous offense. Suppose the evidence to be perfectly clear—overwhelming—and that in the charges every principle of law governing the case is clearly and properly laid down, but in commenting upon the powers and duties of the jury, the same statement should be made by the judge as in this case; would the Court, believing the verdict to be right by the evidence—right by the law—and that the man ought to be convicted,

—reverse the case because in these comments the judge may have so far blinded and misled the jury as to induce them to return a correct verdict,—and, therefore, set it aside?

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This is not a strained construction of this decision, but a correct exposition of its doctrines, when carried to their legitimate conclusion.

Again, if this unchecked right of determining the law exists in the jury as to matters arising upon the trial, is it limited or unlimited? If unlimited, then the jury might pass upon the validity of the indictment, or the legality of any other portion of the record. But this Court has decided, in the case of *Daily v. The State*, at this term, that such is not the province of the jury. But I insist that the legitimate consequence of the doctrines of the Court in this case, when carried out, would give the jury the same power to determine the law upon one as well as another branch of the case—upon the record as well as the evidence.

It is conceded by my brother judges that the case of *Carter v. The State*, 2 Ind. R. 617, was, at that time, a proper exposition of the law—and why? Because it was in accordance with the common law, which was in force here, and which secured the right of trial by jury in a Court, and subject to the control of a judge, as to the admission of evidence and charging the law to the jury. It did not contemplate that the jury should try the case out of a Court, and independent of the supervision of a judge, supposed to be learned in the law, as to the reception of evidence, and as to the exposition of legal questions.

This *Carter* case is in like manner in accordance with the practice, in our federal Courts, under the constitution of the *United States*. That instrument, in all criminal prosecutions, secures to the accused the right to a speedy and public trial by an impartial jury (Const. U. S., art. 3, § 2, and art. 6 of the amendments); and yet but seldom since the impeachment of Judge CHASE has it been maintained that a jury, under those provisions could act independently of the Court; but to the reverse, it is now the daily prac-

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tice for the Court to give them the law, and they determine the facts.

“The record in the *Carter* case shows that the defendant asked the Court to instruct the jury that “the jury are the judges of the law and the facts, and can find their verdict accordingly; which the Court refused to give in terms, but gave it with the following qualifications, to-wit: ‘The jury are the judges of the law and the facts, and can find their verdict accordingly; but you are to believe the law as laid down by the Court to be the law of the land.’”

“Here was a positive injunction laid upon the jury to take the law from the Court, absolutely—not to the same extent that they might determine the facts, but unqualifiedly and without reserve—stronger, much stronger, than the charge in the case at bar; and that instruction was approved by this Court, and the judgment against the man affirmed.

But it is said that the new constitution has abrogated the rule of practice which prevailed at the time of that decision, which was in 1851, and that although that rule of practice was then right, yet that a new era has dawned upon us, or rather upon juries, since the adoption of this new constitution in 1851,

Let us examine this question. Here, it might be premised that if the framers of that instrument had intended to work so radical a change in the practice of administering the laws as to make the jury omnipotent and the judge a mere automaton to record their findings, it is rather strange that so great a change should not have been talked about by them, and so held by some of our numerous judges, in the multiplicity of constitutional questions investigated in the five years past. It is believed that it was not the intention of the framers of the constitution, by the adoption of the section relied on, to institute such entire change. That section is as follows:

“SEC. 19. In all criminal cases whatever, the jury shall have the right to determine the law and the facts.” 1 R. S. p. 44.

That belief is in accordance with the former decisions of

this Court, since 1852, upon the point involved; to-wit, in the case of *Driskill v. The State*, *Rice v. The State* and *Stocking v. The State*, which were convictions for murder in the first degree, and in each of which the decision in the *Carter* case is approvingly alluded to, either directly or indirectly, the convictions maintained, and the men executed. The record in the case of *Stocking v. The State*, points out as one of the erroneous rulings of the Court, that the instructions abridged the constitutional privilege of the jury, and misled them as to their right to determine the law under the constitution, and refers to 1 R. S. p. 44, § 19—thus pointing out the section upon which this decision is now made to rest. And the argument then made by counsel was, that the *Carter* case was based upon the common law and the old constitution, and was then correct; but that the new constitution vested in the jury the power to determine the law as well as the facts, even in “opposition to the Court’s instructions,” &c. In alluding to the instructions, judge STUART says: “This instruction is correct. It is far less objectionable than this Court has sustained. *Carter v. The State*, 2 Ind. R. 617. There the instruction was, that it was ‘the duty of the jury to believe the law as laid down by the Court,’ and it was held to be correct.” So in *Rice v. The State*, Judge PERKINS says: “We shall say nothing upon the subject of the charge of the Court to the jury. It has been held in *Driskill v. The State*, at this term, that such a charge is not erroneous.” In *Driskill v. The State*, referred to, Judge Pettit had instructed the jury that “in this and all criminal cases the jury has a right to judge of the law and the facts; but it is the duty of the Court to instruct them as to what the law is, and it is proper for them to respect and take for law what the Court declares it to be.” It was contended that the part of this instruction which advised the jury that it was “proper,” &c., to the end of the sentence, was wrong. Judge DAVISON says: “The point involved in this position has been decided. *Carter v. The State*, 2 Ind. R. 617, was an indictment for murder. In that case the Court instructed the jury that they were, &c. *Held*,

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that the instruction was right. This case is, in our opinion, a correct exposition of the law, and is decisive of the question under consideration." Here, not only the instruction of Judge *Pettit* is held to be correct, and which it is not intended to call in question now, but the case of *Carter* is referred to as being at that time, to-wit, in 1855, a correct exposition of the law. It is evident, then, that up to that time the construction now placed upon the new constitution, had not been maintained by this Court. And the question is, ought it to be?

In determining this question we should look to some other decisions, &c. In *Murphy v. The State*, 6 Ind. R. 490, and *Lynch v. The State*, 9 Ind. R. 541, this Court held that the Court trying the case has the power to prevent counsel from reading from law books to the jury. In *Welch v. Watts*, this Court held that the Court is bound to instruct the jury. 9 Ind. R. 115. And so is the statute. 2 R. S. p. 110. And so is the statute regulating criminal trials. 2 R. S. pp. 375, 376.

Now, if these decisions are correct, from whence do the jury derive a knowledge of the law that should enable them to come to a correct conclusion in an intricate criminal trial. The Court can refuse to permit attorneys the privilege of reading it in the hearing of the jury. They are authorized, according to this decision, to entirely disregard what the Court may say to them upon the questions of law involved. Are they supposed to have an intuitive knowledge of the law? Is the arbitrary rule and fiction of law to prevail in reference to a juror as in cases affecting a man's personal relations towards society and other men—that he is presumed to know what the law is, and therefore responsible if he violates it? Certainly it will not be argued that the tribunal which holds in its hands the life, the liberty, and the right of property, of every citizen, can arbitrarily dispose of those sacred rights, in blissful ignorance of the principles of law governing their possession and enjoyment. Suppose a case was on trial before a jury who had not made law the subject of reading or reflection, in which the Court should refuse to permit counsel to read

to them the law, and that jury should refuse to pay any heed to the charge of the Court upon the law,—what certainty could there be that the law would be correctly applied? None—however honest the men—unless the fiction is a truth, and no longer a fiction, that every man is presumed to know the law controlling him as an individual, and not only so, but that it applies with equal force to him when acting as a juror, and in pointing out to him law governing the case in hand, as well as his rights and duties as a juror. If this is true, how could such juror, with such intuitive and perfect knowledge of his rights and duties, be misled by a charge directed to a limitation of his rights and privileges, or an increase of his duties? Let us for a moment again advert to the case given, in which it was supposed that the evidence was clear—the charge of the Court upon the law governing the case right—the presumption, under the construction of the constitution maintained in this decision, would be, that the jury had the knowledge and the right to decide the law and the facts of the case correctly,—would that presumption change in a moment, upon the return of a verdict of guilty, because the Court, in charging the jury as to their rights, should say, “it is as much your duty to believe the law to be as charged by the Court as it is your sworn duty to decide upon the evidence,” and therefore the law presumes they were misled?

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All these considerations lead to but one conclusion, and that is, that it was not the intention of the framers of our constitution to thus uproot the safeguards which had prevailed in the administration of our criminal law; but that Courts should still be organized and held responsible to a superior tribunal for a correct exposition of the law, and juries should be impaneled and have the right to pass upon the facts of every case, and determine the application of the law of the case, as charged by the Court, receiving it as law.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

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J. W. Gordon (2), A. H. Connor, M. C. Hunter and P. C. Dunning, for the appellant.

(1) *Post*.

(2) Mr. *Gordon* submitted the following argument in behalf of the appellant:
I shall maintain the following propositions:

I. The jury, in all actions, civil and criminal, at common law, upon general issue joined and submitted to them, had a right to determine the law and the evidence; and in criminal actions this right was absolute—subject to no control nor review.

II. In all criminal cases whatever, the right to determine the law and the evidence is in this state guarantied to the jury by an unequivocal constitutional provision.

First. Of the right of the jury in criminal and civil cases at common law, to determine, upon general issue joined, the law and the facts; and of the absolute ultimate quality of this right in criminal cases.

1. This right is shown by the original constitution and history of the jury itself. The *Saxon* jury originated in the Court of the hundred, in which all the hundredors assembled, and determined cases without the direction of any Court, either as to the law or the facts. Subsequently, owing, doubtless, to the inconvenience arising from this mode of trial, the number was limited to twelve men, who were summoned by the sheriff, from the immediate neighborhood where the facts of the case transpired, and found their verdict from their own knowledge. The whole twelve had to agree to the verdict. From this required unanimity, it not unfrequently became difficult to obtain a verdict, and a change was in consequence introduced into the constitution of the jury. This consisted in summoning others, also from the same vicinage, until there were found twelve who could agree. The next change introduced, was that of summoning witnesses, in case the jury could not agree from their own knowledge; and these witnesses retired with the jury when considering of their verdict, and delivered their testimony privately to them. But this method was not satisfactory, and the witnesses were at length brought before the Court, and examined by the parties under the direction of the judges; after which the jury retired to consider of their verdict, and were at liberty still to find upon their own knowledge, disregarding the witnesses altogether; or to find upon the combined strength of their own knowledge and the testimony; or upon the testimony alone without reference to their own knowledge. From the commencement of this examination of witnesses in Court, dates the beginning of our law of evidence. The following authorities are cited in support of the foregoing observations: Hume's Hist. Eng. vol. 1, pp. 71, 72, 73; Laws of Edward the Confessor, c. 2; Guizot's Hist. Rep. Gov. p. 44; 1 Spence's Equity Jurisdiction of the Court of Chancery, pp. 112, 113, and additional note to 3d chap., *id.* pp. 128, 129; 2 Hale's Hist. Com. Law, pp. 134 to 155, inclusive; 3 Black. Com. chap. 33, p. 349; 2 Sullivan's Lectures, 94, 99, 158; 2 Inst., c. 12 Mag. Charta, p. 24; 1 Reeves Hist. Com. Law, p. 86; 11 Henry 4; 1 Stark. Ev. p. 5, note c. Wood's Inst. p. 597; Hobart's Rep. 227; 2 Reeves Hist. Com. Law, p. 3 to the end of c. 8.

2. The Courts of *England* had no power at common law to compel the jury

in any case, civil or criminal, to find a special verdict. It was therefore at the option of the jury to find a general or special verdict. If in finding a general verdict they disregarded the instructions of the Court, the judges had no right-ful power to set aside the verdict, or to punish the jurors. So far as the Courts were concerned, the finding of the jury, both as to the law and the evidence, was conclusive and final. I do not say that new trials were not grantable in chancery; for upon a proper case made they were. At common law—in the common-law Courts—new trials were not grantable in any case, on account of the erroneous finding of the jury, whether in matters of law or fact. The earliest recorded case of a new trial thus granted, that I have been able to find, dates no farther back than 1648; and *Spence*, in his learned and excellent treatise on the “Equitable Jurisdiction of the Court of Chancery,” dates the first new trial at common law no farther back than 1665. Although this is a mistake, yet it serves to show that even then the practice was not generally introduced, and the exceeding scarcity of instances thereof before that time; for none who have examined Mr. *Spence’s* book will deny his great research. It was not in the power of the Courts of law to grant new trials; the practice of finding and imprisoning juries for disregarding the directions of the Court was never sanctioned by the common law; and the process of attain- tute. Inasmuch, therefore, as the jury could find a general verdict, at their option, including law and fact, in which they might wholly disregard the Court’s direction, and as the Court had no power to call them to account for their finding, they were, as to the Court, judges of the law and the evidence. The want of power in the Courts, either to punish or control them, will be seen by reference to the treatment of *Lilburne’s* jury. 2 State Trials, fol. from 69 to 85; *Penn’s* jury, *id.* 615, 616; and see, also, *Bushell’s* case, Vaughan, 135 to 158; Hume’s Hist. Eng. vol. 4, pp. 349, 350.

3. At common law a verdict, false either in fact or in law, could only be set aside by an attain- tute. Inasmuch, therefore, as the jury could find a general verdict, at their option, including law and fact, in which they might wholly disregard the Court’s direction, and as the Court had no power to call them to account for their finding, they were, as to the Court, judges of the law and the evidence. The want of power in the Courts, either to punish or control them, will be seen by reference to the treatment of *Lilburne’s* jury. 2 State Trials, fol. from 69 to 85; *Penn’s* jury, *id.* 615, 616; and see, also, *Bushell’s* case, Vaughan, 135 to 158; Hume’s Hist. Eng. vol. 4, pp. 349, 350.

The process of attain- tute. Inasmuch, therefore, as the jury could find a general verdict, at their option, including law and fact, in which they might wholly disregard the Court’s direction, and as the Court had no power to call them to account for their finding, they were, as to the Court, judges of the law and the evidence. The want of power in the Courts, either to punish or control them, will be seen by reference to the treatment of *Lilburne’s* jury. 2 State Trials, fol. from 69 to 85; *Penn’s* jury, *id.* 615, 616; and see, also, *Bushell’s* case, Vaughan, 135 to 158; Hume’s Hist. Eng. vol. 4, pp. 349, 350.

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* It was abolished 6 Geo. 4, c. 59, § 60.

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and without any special verdict or special case may find a verdict absolutely either for the plaintiff or defendant." 3 Black. Com. 378.

And *Littleton* had said before him as much: "If they [the jury] will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge," &c. Lit. on Tenures, § 368, as in 2 Coke thereon, 228, *a* & *b*.

Upon which my lord COKE saith: "Although the jury, if they will take upon them (as LITTLETON says) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do; for if they do mistake the law, they run into the danger of an attain; therefore, to find the special matter is the safest way where the case is doubtful," 2 Co. Lit. 228, *a*, *b*.

4. That this was not merely the power, but the right of the jury, according to the common law, is to my mind clear, from the fact that in all cases in the ancient books, and statutes declaratory of the common law, the right to find the facts specially, or a special verdict, is spoken of, and treated as the privilege of the jury, to be exercised or not at their own option. It was doubtless declared by statute for their advantage, that Courts might not compel them to find a general verdict unless they chose to do so. The statute of 2 Westm. is in point. It is there enacted: "*Item. Ordinatum est, quod justiciarii ad assisas capiend. assignati non compellant juratores dicere præcise, si fit disseisina vel non dummodo dicere voluerint veritatem facti, et petere auxilium justic.; sed si sponte velint dicere quod disseisina est, vel non, admittatur eorum sub suo periculo.*" 2 Westm. c. 30. Upon which my lord COKE hath the following commentary: "In the end it hath been resolved, that in all actions personal, real and mixed, and upon all issues joined, general and special, the jury might find the special matter of fact pertinent and tending only to the issues joined; and thereupon pray the discretion of the Court for the law."

I conclude, therefore, that as the jury *might* or *might not* find a special or a general verdict, at their own option, they were judges both of the law and the facts; but if that option, in cases of difficulty, led them to find a special verdict as the more certain method to escape an attain for a verdict false in law, then they had the privilege of doing so. But this special verdict was, after all, but one of two methods of discharging their duty as jurors, either of which was equally open to them, and therefore equally lawful and right.

5. The criminal jury was never subject to attain for verdict false in fact or in law; and as they were superior to any rightful control by the Courts, or any just (I mean legal) punishment for disregarding the directions of the Court in such cases, it follows that their power to decide upon the law and the facts in all criminal cases was a rightful, legal power, as already shown; and also an ultimate and final power, which, when once exercised, was subject to no review, and, therefore, to no reversal. Fitz. Nat. Brev., tit. Writ of Attaint, p. 241 to 253. In none of the ancient decisions or treatises of criminal law, as Coke, Foster, etc., do I find any allusion whatever, of an authoritative character, to attain for false verdict in criminal actions.*

6. But any power, wherever vested by the constitution, and in whomsoever vested, which is thus ultimate; i. e., any power so vested in any functionary.

* Mr. Gordon has, since submitting his argument, furnished me a reference to Hale's P. C., where it is said that an attain might be had for false verdict in a criminal case.—REPORTER.

by the constitution, that the functionary is accountable to no other functionary of the government, for the manner in which he performs the function; and where the function having been exercised, the act itself is subject to no review, or reversal for error; is ultimate, final and rightful, however exercised, at least so far as the constitution vesting the power is concerned. The jury in criminal actions was at common law vested with this ultimate power, at least in all cases of felony. And to admit the power and deny the right, involves all the absurdities arising from an attempt to apply to a man in society, and as a member thereof, the higher law doctrines so much spoken of by honest, well-meaning men, who, nevertheless, in the application of their doctrines to man social—man the citizen—are guilty of a great error in judgment.

It is admitted, that in criminal trials at common law the power of the jury was ultimate and final, whether exercised in acquitting or punishing—in pursuance of the instructions of the Court, or in direct contravention thereof. . 4 Black. Comm. 361.—*Lilburne's case*, 2 State Trials, 69 to 85.—*Penn's Jury*, *id.* 615, 616.—*Bushell's case*, Vaughan, 135 to 158; *The United States v. Gilbert et al.* 2 Sumner, 19 *et seq.*

It follows, therefore, that the power of the jury being thus ultimate, whether exercised in acquitting or punishing, was at common law, and by the original constitution of the jury, rightful. Nor does the force of this conclusion suffer the slightest diminution from the doctrines relating to special verdicts; for they arose as the privilege of the jury—not to diminish but to enlarge their rights in every case. 2 Westm. c. 30, and Coke's commentary thereon, above cited.

7. If the judges, however, had an exclusive right to determine the law in criminal as well as in civil actions, how does it happen that in criminal practice such a thing as a demurrer to evidence is entirely unknown? What is the reason for this diversity? If the Court and jury sustain the same relation to each class of cases, how does it happen that in civil actions the parties, by demurrer to evidence, can take the case from the jury and refer it to the Court, upon an admitted state of facts, while no one contends for any such right in criminal actions? There is doubtless a reason for the diversity; but what other reason can be found than the right of the parties—the state and defendant—mutually to insist upon having the case resolved by the jury? In *England* it was never in the power of a defendant to compel the king's counsel to join in demurrer to the evidence in a criminal prosecution, nor *vice versa*. It was, also, at the option of the judges to overrule any such demurrer, and compel the parties to go on before the jury. It was, therefore, never the right of either the king or the subject at common law; for a right may always be asserted and maintained in Courts of justice, and in spite of Courts of justice. It is of the essence of a right, that it depends not upon any man's will or permission, but upon the law. 1 Chitty Cr. Law, 626.—5 Co. Rep. 104.—2 H. Black. 187.—Coke on Litt., 72.—2 Phil. Ev. 6th ed. 298. And the same conclusion follows from the rule in *The State v. Meade*, 4 Blackf. 309; for if the trial by the Court was void, as being a violation of the right of the state, it seems to be almost precisely the same, if, after going to a jury, the defendant could by demurrer to the evidence take the case from the jury, and submit it to the Court. But if a defendant may not do this as of right, *why*? There can be no other reason, but that either party has a right to have the jury not only find the facts, but

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deduce the legal consequences therefrom. And that makes them judges of the law and facts; and is, therefore, all that I contend for in this cause.

8. The right to find a general verdict necessarily implies the right to find—judge—both the law and the facts; for *ex facto oritur jus*. But how shall this take place where the law, which the jury are bound to take from the Court, under pain of being guilty of the crime of perjury, is laid down before the facts are determined, unless we concede to the Court also the right to determine both the facts and the law, and thus abolish all useful functions of the jury, except, perhaps, that of shielding the judges from the responsibility incident to determining both the facts and the law in cases where that duty might become unpleasant? The facts of every case form the germ from which the law grows up—the law is but the plant.

Every judge who has reflected upon the philosophy of any rule of law, knows that it is impossible to state it, without stating also, either expressly or by implication, the facts out of which it arises. Every charge must do this. To assume, therefore, that the jury are bound to find the law to be as the Court “charge it to be,” is to assume that they are equally bound to find the facts as they are, either expressly or by necessary and unavoidable implication, embodied in the charge. And that is to take from the jury both the law and the facts—is, in effect, to annihilate every useful function of the jury, where they are bound to give a general verdict.

The most that can be claimed for the charge of any Court prior to verdict found, is that it is an approximation to the rule of law that must govern the very case, under trial, when the jury ascertain it. The charge, therefore, can never become more than an analogy, more or less proximate to the case at bar. To make it anything more, fixes both the law and the facts before the jury retires; and makes them but the echo of the Court. My Lord HALE seemed to have had this view before him, when he wrote his account of the resolution of “all the judges of *England*,” in the case of *Wagstaff*, who was fined at *Newgate* for acquitting *Richard Tomson* and others indicted for conventicles. The judgment fining *Wagstaff* alleges that the acquittal of *Tomson* was “*de prædicta transgressionem et contemptu contra regem hujus regni anglia; et contra plenam evidentiam, et contra directionem curia in materia legis*,” etc. *Wagstaff* and his fellows were for this acquittal committed. He obtained a *habeas corpus*, whereon he was brought before the C. B., “and all the judges of *England* were assembled to consider of the legality of this fine and imprisonment thereupon.” HALE then says: “It was agreed by all the judges of *England* (one only dissenting), that this fine was not legally set upon the jury; for they are the judges of matters of fact, and although it was inserted in the fine, that it was *contra directionem curia in materiâ legis*, this mended not the matter; for it was impossible any matter of law could come in question till the matters of fact were settled, and stated and agreed to by the jury, and of such matter of fact they were the only competent judges.” 2 Hale’s *Pleas of the Crown*, pp. 312, 313. It would be difficult to frame an authority for my proposition more directly in point. It is conclusive, and decisive of the right of juries at common law to determine the law and the evidence—a right so far as the law is concerned, arising from their antecedent and conceded right to determine the facts, and the impossibility of the Court’s stating the law before the jury have determined the facts. Neither argument nor authority can add anything to

the force of this position. It stands on the vantage-ground of a self-evident truth. May Term, 1858.

9. The weight of authority, both legislative and judicial, remains to be considered. Here all the authorities already cited are either directly or incidentally pertinent to our position. Co. Litt. § 368, and commentary thereon.—4 Black. Comm. 361.—*Rex v. Woodfall*, 5 Burr. 2661, with *Junius's* comments thereon, 2 *Junius's* Letters, p. 84: the reasoning is unanswerable.—2 Wilson's Lectures on the Law, 372.—1 Chit. Cr. Law, 520.—*Henfield's* case, Wharton's Am. State Tr. 87.—*Frier's* case, *id.* 587.—*Callender's* case, *id.* 710.—3 Dall. 4.—4 Mass. R. 25.—1 Baldw. 108.—6 Shep. 346.—2 Campbell's Lord Chief Justices, in *vitâ Mansfield*, 411, 412.—6 Campbell's Lord Chancellors, 190.—*Id.* 340 to 346.—5 *id.* 50 *et seq.*—*Lancey v. Bryant*, 30 Maine R. 466.—*The State v. Snow*, 6 Shep. *supra.*—*The State v. Jones*, 6 Ala. R. 666.—*Warren v. The State*, 4 Blackf. 150.—23 Vermont R. 14.—S. C. 2 Leading Crim. Cases, by Bennett and Heard, 388.—1 Parker's Criminal Cases, 596, 603.—1 Wheeler's Criminal Cases, 108, 221.

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It is not denied that there are cases both in *England* and *America* adverse to this doctrine; but it is believed that a careful analysis of the foregoing authorities, and positions already discussed, must satisfy any unbiassed mind that the principle of the law is clearly in favor of the plenary right of the jury as contended for.

The case of the *United States v. Battiste*, 2 Sumner, 240, seems to have been the first *American* case against this right. But while it distinctly denies the right, it asserts no authority, and its reasoning is altogether inadmissible, as a moment's reflection will satisfy the Court. The Supreme Court of *Massachusetts* (10 Met. 14, 263) followed in Mr. Justice STORY's wake, and asserted fully the same doctrine; but at the same time, were guilty of the same inconsistency that is so cogently urged against Lord MANSFIELD by *Junius, supra, viz.*, denying the right, but admitting the incident—the discussion of the law to the jury.

This right of juries has, however, both in *Europe* and *America*, been frequently asserted by legislative acts, declaring the law to be, as I have in this argument labored to show it was. Thus, 1. Mag. Chart. c. 29, and Lord COKE's commentary thereon, are to my purpose. 2. Mr. Fox's libel law (1792) which is a declaratory act, sustains the right of juries at common law, to determine the law and the evidence in that form of criminal cases for which it provides, and incidentally recognizes it in every other. 29 Parl. Hist. pp. 551 to 602.—*Id.* 1293 to 1800.—Opinion of the judges adverse to the right, *id.* 1361 to 1371.—Lord CAMDEN's speech in favor of the right, *id.* 1404 to 1414.—Further debate upon the bill, from page 1414 to 1431; also from 1534 to 1538. The entire discussion *pro* and *con* is cited, because it is deemed pertinent to the case at bar; and highly interesting, as marking the close of a great struggle for an important popular principle. 1 Chitty Cr. Law, 530.

In the state of *New York*, in 1805, a similar declaratory act was passed; and although the Courts of that state had divided in libel cases before its passage—some of the judges declaring, and others denying the right of the jury to determine the law and the facts—yet they agreed at once, upon its passage, as they had in other criminal cases before done, that the jury were now, in libel cases, the judges of the law and the facts. See BENNETT's dissenting opinion in 23

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Vt. R. 14. The *New York* act seems to have been a copy of the *English* act. 3 Johns. Cases, 337.—Bennett & Heard's Leading Cr. Cases, 430 to 431.

The constitution of *Indiana* (1816), while it simply declared that the right of trial by jury should remain, in all civil and criminal cases—with certain unimportant exceptions—inviolate, provided "that in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the Court, as in other cases." Const. 1816, art. 1. §§ 5, 10. This, too, is almost, if not altogether, a literal transcript from *Fox's* bill, *supra*. Our Supreme Court, while denying the right of the jury to determine the law in other criminal cases, conceded it in cases of libel prosecutions. *Townsend v. The State*, 2 Blackf. 157. BLACKFORD, himself, dissented from all that part of the opinion that denied the right in any criminal case, and doubtless held that the constitution in relation to libel prosecutions was declaratory of the common law, as the libel law of Mr. *Fox*, in *England*, had been held before. But the case of *Townsend v. The State* is, upon this point, authority, and stands with force undiminished by any subsequent case, as a construction of this 10th section of the first article of the constitution of 1816, as I shall contend when we come to consider the constitution of 1851.

From these observations I am led to conclude, that the jury at common law were entitled to determine the law and the facts in criminal cases.

Secondly. I shall now briefly consider the second branch of the argument, viz.—The right of the jury in all criminal cases whatever, to determine the law and the facts, as it is guarantied to them by the constitution of *Indiana*.

1. The constitution employs the following language: "In all criminal cases whatever the jury shall have the right to determine both the law and the facts." Art. 1, § 19.

This provision is too plain to admit of doubt. Constraction and interpretation are unnecessary. It is not possible to conceive language more direct and unequivocal. I regard it as decisive of the question before the Court. Let us contrast this simple provision of the constitution, with Judge HANNA's charge in the Court below. The learned judge employed the following remarkable language:

"You are the exclusive judges of the evidence, and may determine the law; but it is as much your duty to believe the law to be as charged to you by the Court, as it is your sworn duty to determine the evidence."

Is not this a flat denial of justice, as secured to the citizens of *Indiana*, "in all criminal cases whatever?" Is it not a plain usurpation of the function of the jury by the Court? Is it possible, indeed, to conceive a more palpable denial of right on the one hand, or usurpation on the other? Does not the constitution plainly indicate in the words, "the right," that there is but one constitutional right in the state "to determiné the law and the facts?" And does not that instrument, by conferring that right upon the jury "in all criminal cases whatever," inform every other tribunal, that its exercise by it, is an invasion of that function of the jury? How could his Honor have stricken down the right both of the jury and of the citizen by a blow more direct and undisguised? What more forcible language than he employs can be found, to inform the jury that they must either conform to his opinion of the law, or load their consciences with the burthen of perjury? And, if the right to determine the law may be thus taken from the jury, what hinders his Honor from claim-

ing the right to determine the facts also? It manifestly is protected by no higher constitutional security. Indeed, as already shown, the right to determine the law of the case for the jury, before the facts are settled, includes the right also to determine the facts. Hence, the charge was a complete usurpation of both, and left the jury no other rightful function but to echo the opinions of his Honor.

I am aware that the statute provides, that "the Court must charge the jury." 2 R. S. p. 375, § 103; and, again, that "in charging the jury he [the judge] "must state to them all matters of law which are necessary for their information in giving their verdict." *Id.* p. 376, § 113. But these provisions, if consistent with the constitutional provision under consideration, cannot divest the right which it confers upon the jury, nor modify it even; for, so far as one provision of law modifies another, it does conflict with that other. Nothing can, therefore, be claimed in support of the charge of the Circuit Court, from these or any other statutory provisions; for they are all subordinate to the constitution, and, in so far as they might, if of equal authority, tend to modify its provisions, are unconstitutional and void.

But the statute last cited shows plainly that the charge of the Court required by it, must be restricted to matters of law. Hence, if the Court should charge any matter not of law, or against law, the duty imposed would be violated; and if such matter not of law, or contrary to law, tended to mislead the jury in the performance of their constitutional function, it would be error. But the constitution is the highest law, and whatever contravenes its provisions—be it in the acts of the general assembly, or of any other branch of the government—is null. So that no series of acts concurring to the same end, on the part of any, or, indeed, of all the branches of the government, can effect a constitutional modification even, of any right conferred by the constitution. Much less can such acts result in depriving the people of any right reserved to themselves in the bill of rights prefixed to their organic law.

I hold, with this Court, that it is a sound rule of interpretation, that constitutional provisions are to be construed strictly as against the powers they confer, and in favor of the natural liberty of the people, upon which all constitutions and governments may be regarded as restrictions. But the reason of the rule must form its limitation in practice. When that ceases the rule ceases. Here the reason for construing constitutions strictly is to favor natural liberty upon which they are restrictions. Hence, if there be any provision, or class of provisions in a constitution, asserting the sacredness of that liberty in any regard from the interference of the government which it creates, the reason of the rule does not apply to that. On the contrary, it demands an enlarged and liberal interpretation, and for the very same reason. Such an interpretation is conservative of the natural rights of man. If, therefore, there should be any doubt in regard to the meaning of the section of the constitution under discussion, it must be liberally construed; for it is a part of the reserved rights of the people, which they secure from invasion or impairment by any department, or all the departments, of the government. They have joined it with the rights of conscience; and the government can no more constitutionally impair it, than they can infringe the religious liberties of the people. Can a single circuit judge, by a word, overthrow the right of the jury, thus secured from invasion by the whole government? If he can, what is the use of a bill of rights? If he cannot, the charge given below—as not only not law, but contrary to ex-

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press law—to the constitution—was erroneous. Its tendency was to deprive the appellant of a constitutional trial, by taking from his jury the questions of law involved in his case. It resulted in a verdict of guilty against the defendant. He has a right to attribute that verdict to this erroneous charge. He does so, and demands that the judgment based upon it be reversed.

2. It may, perhaps, be said that the right of the jury was sufficiently asserted by the Court, in the words, “and may determine the law;” but in their connection these words mean nothing. Indeed they mean something less than nothing. They seem only to have been introduced the better to enable the Court to give point and effect to what follows, namely: “but it is as much their duty to believe the law to be as the Court instructs them it is, as it is their sworn duty to determine the evidence.” The meaning of this clause of the charge is unequivocal. But if not, why did the Court refuse to give the charge asked by the defendant? That was couched in these words: “By the constitution of *Indiana* the jury, ‘in all criminal cases whatever,’ are the judges, both of the law and the evidence.” The denial of this charge fixes beyond all question the intention of Judge HANNA to take the question of law wholly from the jury; or, at least, only to give them the right to dissent from him in regard to it, on condition of their committing perjury.

3. The constitution of 1816 differed widely from the present constitution on this point. It provided for “a speedy public trial by an impartial jury;” “and in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the Court, as in other cases.” Art. 1, §§ 10, 13. Yet under these provisions, and the beneficent common law, it was held error by this Court to deny a charge like the one asked in the case at bar, by the appellant. *Warren v. The State*, 4 Blackf. p. 150. By a stronger reason, it must be error under a constitution which declares that, “in all criminal cases whatever, the jury shall have the right to determine both the law and the facts.”

4. I submit the following authorities as in point; for, although arising under constitutions less explicit than ours, yet they clearly indicate what would have been the rulings of the Courts by which they were rendered, upon it. *Patterson v. The State*, 2 Eng. (Ark.) 59.—*Sanford v. The State*, *id.* 328.—*Bell v. The State*, 5 *id.* 536.—*Holder v. The State*, 5 Georgia R. 441.—*Callender's Case*, *supra.*—*Frier's Case*, *supra.*—1 Chitty Cr. Law, *supra.*—*Townsend v. The State*, 2 Blackf. 151.

5. So far, then, as this argument stands upon constitutional grounds, its force is clear, from a comparison of art. 1, §§ 5, 10 and 13 of the constitution of 1816, with art. 1, §§ 19 and 20 of the present constitution. If the right which I claim for the jury “in all criminal cases whatever,” may be abridged by the Courts, then the Court has a right to determine the law in prosecutions for libels, as well as in other cases. But who will contend for this exploded demand of an oppressive government?

6. I come at last to the favorite argument of those who deny the right of the jury to determine the law in criminal actions. It might appear to a modest man invidious to urge it; but it has been urged, and will no doubt be urged again, by those who may regard the authority of the jury as an unpleasant restriction of their own power over the lives and liberties of their fellow citizens. They say, that the criminal jury should not be permitted to exercise the right in question, because *they are ignorant of the law.*

Now, I think, a brief examination of this argument will put it down.

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1st. If it were conceded that juries were entirely ignorant of the law, that ignorance cannot deprive them of a right conferred by the constitution. It is only a reflection upon their fitness for the exercise of that right. The same reflection might be extended to some of our Courts, with equal justice and propriety. It simply resolves itself into the question, have the people wisely bestowed the power in question upon the jury? Judge HANNA thinks not. I see proper to differ with him. At any rate, as the question for the Court is rather the fact of the bestowal of the power in question, than the wisdom thereof, I am content to confine myself to the fact. This case stands upon that—not upon its wisdom or folly.

2dly. But the jury are the people. If they have not capacity to determine the law, when the constitution gives them the right, and thereby imposes the duty, to do so, by what reason shall we be able to establish their capacity to elect judges capable of doing what they themselves are incompetent to perform? Surely, the wise choice of a judge is a more difficult function, than the determination of a simple question of law; for it demands a knowledge both of the duties of the judge, and his fitness to perform them—a knowledge of the law and of his proficiency therein, and a judgment upon the relation sustained by the man to the law.

3dly. All men are presumed to know the law. *Ignorantia legis neminem excusat.* Of course this knowledge must be held to extend to all the purposes of the law. The jury is a function of society, invested by the constitution with the right to determine both the law and the facts in all criminal cases whatever. To presume them ignorant of any matter relating to that function, is contrary to the maxim, and to the constitution. The Court has no right to indulge any such presumption. It can presume no man ignorant of the law.

4thly. But the ignorance of jurymen must be either a matter of fact, or a matter of law. As a matter of fact the same objection may with great force be urged against many of our judges. All reversals of judgments go to establish it. The argument would, then, lay the foundation for assailing the right of these Courts to determine any question of law, if their ignorance of the law be regarded as a mere matter of fact, and that fact, when established, as sufficient to oust them of jurisdiction. If, on the other hand, it is to be regarded as matter of law, then no man is presumed ignorant of the law.

5thly. The argument plainly assumes that there are two degrees of knowledge of the law, if taken in connection with the maxim—one of the people, the other of the legal-caste. Now, if this distinction be conceded to exist in *Indiana*, where every voter of good moral character may become a member of the legal profession, still there lies in the distinction itself, the answer to the argument sought to be based upon it. The citizen, in the commission of any given crime, can only become guilty in fact and in conscience by virtue of the law as he is presumed to understand it. Should the jury be satisfied in any case, that the defendant was wholly ignorant of the existence of any law making his act criminal, or that his act was, in a moral point of view, wrong when done, it would undoubtedly be their duty to find him not guilty. Thus idiots, lunatics, monomaniacs, and the like, are entitled to acquittal, when it would be proper to convict others. If, then, the people are to be regarded as having one degree of knowledge, and the Courts another, I ask, against which shall a defendant in any criminal prosecution be taken to have offended?—the pop-

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ular, or the professional? Certainly only that which he had, at the date of the offense. That is generally the popular. Where that is the case, then only against that has he sinned; for that only, brings guilt to his conscience. To judge him by a more exact knowledge, involves all the injustice of punishing an innocent man by a law which he knew not, and, upon our hypothesis, could not know. This would lead to a different rule in different cases; that every man may have justice according to the completeness and accuracy of his knowledge of the law. Justice demands this diversity. Where only can this just measure of justice be found? I answer, in the jury—the defendant's fellow-citizens—his country—his peers. They know the law as he knew it. They represent the popular ideal of the law, as it is written upon the hearts and consciences of the people—as the transgressor understood it when he transgressed. They are to him, therefore, the living law. It is meet and proper they should judge the law for him. It is not justice to apply the technical rule of the Courts. Justice demands the living rule of the people—that which sways, controls, makes guilty, or absolves the consciences of the masses. To that the offender must answer, by that stand or fall. It is no more than simple justice, that the warm, living, humanized law, as it is written in the popular heart, should be applied to each case by the defendant's neighbors and peers; for difference of education, origin and circumstances, tinge with different shades those acts which all recognize as criminal. I beg leave to introduce another non-professional authority at this point. I find my justification for doing so in the fact that mere lawyers have not always spoken best on questions affecting the liberty of the people—the rights of humanity.

"Society cannot but live in a state; the high destiny of man demands it; the state acts through laws; they are the great organs of human society, the organs of combined reason; without them men cannot live in society, or fulfill that for which they were created—and now, when the very moment ultimately arrives for which the law was made, when it is finally to be applied as a general rule to a practical and concrete case; when, in short, the abstract principle is to be realized in practical life, for weal or woe, for the protection of some, or the punishment of others, it is in a great measure left to the juror, to the citizen taken fresh from the people. The jurors, therefore, are justly called by the *British* law the country. There is a deep meaning in this expression, as it has grown in the course of centuries; for the jury truly and practically represent the country to the person that is to be tried. The law is the expression of the public will, and the jury represent the jural society, in judging whether, in the given case, the facts warrant the application of the law. The jury represent the country, not the government; they judge the facts according to rules and laws indeed, but also with the feeling of living men, and not merely as if they represented the abstract law, as it is written down. To represent this a learned judge would be sufficient. The jury represents, or rather is, whenever faithful, the living, operating law. Indeed, it may justly be said, that though but for a brief time, yet, for this brief time, a jury represents more fully and entirely human society as formed into a state, with its great objects, than any other person or body of men, even that of the monarch not excepted." Lieber's Pol. Eth., vol. 2, pp. 603, 604.

I have been thus led to conclude that both at common law, and by virtue of the constitution of *Indiana*, the jury, "in all criminal actions whatever, have the right to determine both the law and the facts;" and that this beneficent

authority is most favorably bestowed for the promotion of the ends of justice, and the liberty and security of the people. And, satisfied that such is the case—that I am sustained in this conclusion by the authority of law, and the necessity of reason—the growth of a principle resident in the nature and fitness of things—from which there is no escape, I feel neither regret nor mortification, that among the old lawyers this right of the jury was denied most earnestly by those judges who were the willing tools of royal oppression and cruelty, and among others by the infamous JEFFREYS, upon the trial of ALGERNON SIDNEY, whose death, though upon the scaffold and by the headsman's axe, became to him the gateway of an imperishable glory and renown, while his brutal judge descended from the judgment seat to an immortality of unmingled infamy and disgrace.

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TODD v. SELMAN.

These cases were decided upon the weight of evidence.

APPEAL from the *Shelby* Circuit Court.

Wednesday,
June 23.

Per Curiam.—*Selman* brought his action against *Todd* before a justice, upon an account which is thus stated:

“1854. *Levi Todd*, to *Andrew G. Selman*, Dr.

To cash loaned	-	-	-	-	-	\$86 40
To medical bill	-	-	-	-	-	10 00

\$96 40”

Before the justice, the plaintiff recovered a judgment, and the defendant appealed. In the Circuit Court the case was submitted to the Court, who found for the plaintiff. The defendant moved for a new trial upon two grounds—1. Because the finding of the Court is contrary to law. 2. Because the finding is unsustained by the evidence. He also moved in arrest, but has failed to point out the grounds of the motion. These motions were overruled, and judgment rendered in favor of the plaintiff for 82 dollars.

The evidence is upon the record. We have carefully examined it, and are of opinion that it sustains the finding

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of the Court. And as no questions, other than those relating to the weight of evidence, appear to have been raised in the Court below, the judgment will be affirmed.

The judgment is affirmed with 5 per cent. damages and costs.

W. J. Peaslee, for the appellants.

E. H. Davis and *C. Wright*, for the appellee.

THOMPSON and Others v. COOPER and Others.

Suit to recover damages for the unlawful taking of property. Answer, 1. A general denial. 2. That the property belonged to *A.*, who fraudulently conveyed the same to the plaintiffs to defraud his creditors; that while he owned the property it was attached by one of the defendants, who was deputy sheriff, on proceedings for debt by *B.*; that while the property was in the hands of the sheriff, under attachment, an execution was issued upon a judgment in favor of *B.*, which was levied upon the same property by the same person; that this was the taking complained of. No reply. It was admitted that the taking was upon execution issued upon a judgment, as alleged in the answer. *Held*, that the averment that there was a judgment against *A.* must be taken as true.

Wednesday,
June 23.

APPEAL from the *Marshall* Circuit Court.

DAVISON, J.—The complaint in this case charges that the appellants, who were the defendants, on, &c., unlawfully, and without leave, took a large quantity of merchandize, consisting of boots, shoes, hats, prints and sheetings belonging to the appellees, who were the plaintiffs, which property the plaintiffs afterwards, on, &c., demanded of the defendants, but they refused to deliver the same, or any part thereof, to the plaintiffs. It is averred that the property so taken is worth 500 dollars, and for that amount judgment is demanded, &c.

The defendants' answer contains three paragraphs. The first is a general denial. The second and third are substantially the same. They aver that the property mentioned in the complaint was the property of one *Nelson*

W. Pearson, and that while he so owned the property, he fraudulently conveyed the same to the plaintiffs to cheat and defraud his creditors; and that in *July*, 1855, while he, *Pearson*, so owned the property, an attachment issued against his property (on proceedings for debt pending in the *Marshall* Common Pleas, by *Dunham, Church & Co.*, against him, *Pearson*), in which the same property, so fraudulently conveyed, was attached by the defendant, *Thompson*, who was then and there deputy sheriff, &c.; that while said goods were so in the hands of said sheriff, under attachment, an execution was issued on a judgment in favor of said *Dunham, Church & Co.* against *Pearson*, which was levied on said goods by *Thompson*, as such deputy sheriff, and which is the same taking alleged, &c.

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There was no reply to the answer. Verdict for the plaintiffs. New trial refused, and judgment.

There is a bill of exceptions which shows that the plaintiffs, upon the trial, admitted "that the goods taken were taken on an execution issued on the 18th of *July*, 1855, upon a judgment in the *Marshall* Common Pleas, rendered on the 17th of *July* in the same year, in favor of *Dunham, Church & Co.* against *Nelson W. Pearson*, and were levied on by an attachment issued at the time the suit in which said judgment was rendered was brought, and that the goods levied on are the same goods described in the complaint." This admission presents the only facts which at all relate to the questions raised for our consideration.

The evidence being closed, the Court, at the instance of the plaintiff, and over the defendants' objection, instructed as follows: "Before the defendants in this case can justify under the execution, by attacking the transaction between *Pearson* and the plaintiffs for fraud, they must show the existence of a judgment against *Pearson*, and the judgment can only be shown by producing the record of it." The position assumed by this instruction is, in the abstract, correct. But in its application to the case made by the record, the Court, in our opinion, committed an error. We have seen that there was no reply to the answer; and as the second and

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third paragraphs set up a valid justification, and there being no reply, these paragraphs, so far as they aver that there was judgment against *Pearson*, must, for the purposes of the action, be taken as true. 2 R. S. p. 44, § 74.—*McCarty v. Roberts*, 8 Ind. R. 150. Moreover, the bill of exceptions explicitly shows that the plaintiffs upon the trial admitted the existence of such judgment. In view of these admissions in the record, it seems to us that the instruction was not pertinent to the case, and should not have been given, because it may have misled the jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. W. Chapman and *J. B. Meriwether*, for the appellants.

CAMPER and Others v. HAYETH and Others.

By the proviso of § 116, 2 R. S. p. 275, a suit by residuary legatees will lie in the Common Pleas, to set aside the settlement of an estate for a mistake by the executor in failing to account for money.

But not for money paid to the widow, which neither the will nor the law allowed her. The only remedy, in such case, is an appeal to the Circuit Court, as provided by the first clause of the same section.

That statute was intended to protect the executor or administrator from suits, except for mistake or fraud, where the order making a final settlement was not appealed from.

Sections 138 and 139, 2 R. S. p. 280, apply to cases where distribution is to be made to *heirs*, and not to a case where it is to be made to residuary legatees.

Thursday,
June 24.

APPEAL from the *Parke* Court of Common Pleas.

WORDEN J.—This was a suit by the appellees, *Thomas C. Hayeth et ux.*, *George W. Falls et ux.*, *Isaiah Swayne et ux.*, *Jephtha Vanwicke et ux.*, and *Mary Martin*, daughter of *Charlotte Martin*, deceased, as legatees of *Harman Camper*, deceased, against *Robert K. Camper*, executor, and *Ellen Camper*, widow of *Harman Camper*, deceased, and *Levi* and *Margaret Martin*, appellants, to set aside the settlement and distribution of the estate of *Harman Camper*,

deceased, made by said *Robert K. Camper*, in the same Court. May Term,
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The allegations in the complaint, so far as it is necessary to notice them here, are in substance that *Robert K. Camper*, as such executor, in said settlement, failed and neglected to account for the sum of 119 dollars and 25 cents, money on hand at the time of the testator's death. And also, that he wrongfully paid to said *Ellen Camper*, widow of decedent, the sum of 298 dollars and 51 cents, to which she was not by law entitled, which sums were not distributed to the legatees as they should have been. The Court below found these items for the plaintiffs, and, so far, set aside the settlement, and rendered judgment for the plaintiffs against said *Robert K. Camper* for the amount. CAMPER
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The sum of 119 dollars and 25 cents was admitted to have been unaccounted for through mistake, occasioned by the inadvertence of counsel who assisted in preparing the papers for final settlement, but it was alleged by defendant that as soon as the mistake was discovered he proceeded in said Court to correct it, and did correct it, but that this suit was brought before he had time to make the correction. We see no error so far as this sum is concerned, as there is no evidence before us showing that the mistake was in point of fact corrected, or the amount distributed. What would be the effect of the correction of such error after the institution of a suit for the purpose of compelling such correction, we do not decide, as the question is not presented.

The item of 298 dollars and 51 cents paid to the widow, stands upon different ground. It appears from the complaint that the executor filed his account for final settlement, in which he charges himself with a balance of 973 dollars and 31 cents, "to be distributed under the provisions of said will, and which the said *Robert*, executor as aforesaid, distributed as follows:

" To the said widow, <i>Ellen</i> , the residue of her	
portion of 300 dollars allowed to her by law,	\$77 73
" Also, one-third of residue,	298 51
" Leaving a balance (to be distributed under the	
will) of	597 07

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“Which he distributed as follows,” &c.—here follows a distribution to plaintiffs and others, of the residuum of the estate, which account was allowed and passed by said Court as a final settlement of the estate.

Upon the supposition that neither the will nor the law gave this money to the widow (a question which we do not decide), the question arises whether the plaintiffs below pursued their proper remedy.

The statute upon which the suit was brought, and upon which counsel for the appellees rely to sustain the proceedings below, provides as follows, viz.:

“After the debts and legacies of an estate, and charges of administration are paid, and all claims in favor of such estate are disposed of according to law, the executor or administrator shall be discharged from the further administration thereof, and no final settlement shall be revoked or reopened, except by appeal to the Circuit Court, and the same shall there appear to have been illegally made: *Provided, however,* That any person interested in said estate so settled, may have said settlement set aside for mistake or fraud, at any time within three years after said settlement, and if such person be under any legal disabilities at the time of said settlement, then within three years after the removal of such disability.” 2 R. S. p. 275, § 116.

The proviso in the law above quoted, seems to convey the idea that for “mistake or fraud” in the settlement, there may be a different remedy than an appeal. Hence, we incline to the opinion that the suit is well brought to correct the mistake in reference to the 119 dollars and 25 cents. But the mistakes contemplated are evidently mistakes of fact, and not mistakes or errors of law that may have been committed on the settlement. There is no mistake or fraud charged in reference to the money paid the widow. Hence, we are of opinion that the only remedy was by appeal to the Circuit Court, if the money was illegally paid to her on the distribution.

The statute was evidently intended to protect the executor or administrator from suits, except for mistake or fraud.

where the order making a final settlement was not appealed from.

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It is objected that the order of the Court making the final settlement, although it might be a protection to the clerk for paying over the money, would not protect the executor; and in support of this position, §§ 137, 138 and 139, 2 R. S. p. 280, are cited. Section 137 provides for distribution after payment of debts and legacies. Section 138 is as follows, viz.:

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“ At the term when a final settlement of an estate is made, if there be any surplus, the Court shall order notice to be given thirty days before the ensuing term, for three weeks successively, in some newspaper printed and published in the county, if there be any, and by notices posted up in five public places in the county, that at the next term, on the first day thereof, such surplus will be distributed among the heirs according to law.”

And § 139, is as follows:

“ At the next term after such publication, if any of the heirs shall appear, and prove their heirship to the satisfaction of the Court, after having examined the heirs applying, and any other person deemed proper, under oath, touching the number of decedent's heirs, and their degrees of relationship to him, such Court shall order the clerk to distribute such surplus among the heirs applying, reserving the shares of those who have not proven heirship, until they appear in person, or by guardian or attorney, and establish their heirship, when the Court shall order payment to be made to them, such guardians or attorneys.”

Both of the sections above set out apply to cases where the distribution is to be made to *heirs*, and not where it is to be made to residuary legatees, as in this case. Where the property is disposed of by will, the will being before the Court, there is no necessity of continuing the cause and giving notice, as the Court can see from the will what is to be done with the residuum, and dispose of it accordingly. Where the distribution is to be made to heirs, numerous questions may arise as to heirship, advancement, &c.; hence in such case the law provides for notice.

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Neither the letter nor spirit of the sections relied upon is applicable to the present case. But besides this, the complaint shows not only that the distribution was made, and "allowed and passed by the Court," but that the plaintiffs received and receipted for their respective shares. We do not speak of the receipts as being conclusive, but to show that the parties were present and acted upon the settlement without waiting to be brought in by notice.

It being clear to our minds that the said sum of 298 dollars and 51 cents cannot be recovered in this suit, it follows that a motion for a new trial, which was made, should have been sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded for a new trial.

J. P. Usher, for the appellants.

D. M' Donald and *A. G. Porter*, for the appellees.

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Under art. 5, 2 R. S. p. 364, the death of the principal in a recognizance, after forfeiture entered, may be pleaded by the bail in bar of an action against him upon the recognizance, except for costs.

Thursday,
June 24.

APPEAL from the *Tippecanoe* Circuit Court.

WORDEN, J.—Complaint by the state against *John B. Allen* and *Edward S. Woolfolk*, upon a recognizance entered into by them on the 27th day of *April*, 1854, for the appearance of *Allen* before the *Tippecanoe* Circuit Court, at the next term thereof, to answer to a charge of assault and battery with intent to commit a felony. Averment of the non-appearance of *Allen*, and the forfeiture of the recognizance.

The defendant; *Woolfolk*, appeared and answered, as to all except the costs, that *Allen* on the 15th of *August*, 1855, died, whereby he was prevented from surrendering him in discharge of the recognizance.

To this answer the prosecuting attorney demurred, and assigned the following cause of demurrer: May Term,
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“ Because the answer shows that said *Allen* departed this life on the 15th of *August*, 1855, more than one year after the forfeiture of the recognizance, during which time the said *Allen* could have been surrendered in Court in discharge of the recognizance, but does not show any cause for not surrendering the said *Allen* after forfeiture, and before his death.” WOOLFOLK
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This demurrer was sustained by the Court. *Woolfolk* excepted, and there was final judgment against him.

This is the only error assigned.

It is provided by statute that “ The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open Court, or to the sheriff, and upon the payment of all costs, may thereupon be discharged from any further liability upon the recognizance.” 2 R. S. p. 366.

The question arises whether, under this statutory provision, the death of the principal after forfeiture entered, can be set up by the bail in bar of an action except for costs against him on the recognizance.

At common law, in civil cases the bail became fixed and liable to be proceeded against, upon the return of *non est inventus* to a *ca. sa.* issued against the principal. But still, by the favor and indulgence of the Courts, he might, within four days after the return day of the process against him, surrender his principal, and procure an *exoneretur* to be entered. *Vide Lewis v. Brackenridge*, 1 Blackf. 112; *White v. Guest*, 6 *id.* 228. But this method of procuring an *exoneretur*, by surrendering the principal after the bail became fixed, was considered a *matter of favor and indulgence*, and not a *matter of right*; hence the death of the principal after the bail became fixed, would not entitle the bail to an *exoneretur*. *Davidson v. Taylor*, 12 Wheat. 604.

The right of the bail, under the statutory provision above quoted, to surrender the principal at any time before final judgment against himself, is absolute, and does not depend

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upon favor and indulgence, or the discretion of the Court, hence the decision in *Wheaton*, which is undoubtedly in accordance with the common law, is not applicable.

The effect of the recognizance must be determined by the law regulating the right of the surety to surrender his principal, as much as if that law were incorporated into the recognizance and made a part of it. What is the effect of the recognizance then, so far as the surety is concerned? It is that on forfeiture, he will pay the amount, or surrender the principal, before final judgment is rendered against himself.

Where he is prevented, by the death of the principal, from making the surrender, it seems to us, both on principle and authority, that he is discharged from liability. It is like a bond with a condition, compliance with which has been rendered impossible by act of *God*. In such case no action lies, as the performance is excused. Co. Lit. 206, *a*.

It has been held in several cases that where the principal has been discharged from imprisonment by virtue of insolvent laws, after the bail had become fixed by a return of *non est* to a *ca. sa.* against the principal, such discharge releases the bail. Such was the case of *Beers et al. v. Haughton*, 9 Peters, 329.

STORY, J., in delivering the opinion of the Court, remarks as follows: "Now, the doctrine is clearly established, that where the principal would be entitled to an immediate and unconditional discharge if he had been surrendered, there the bail are entitled to relief by entering an *exoneretur* without any surrender. This was decided in *Mannin v. Partridge*, 14 East, 599; *Boggs v. Teackle*, 5 Binn. 312; *Olcott v. Lilly*, 4 Johns. 407. And *a fortiori*, this doctrine must apply where the law prohibits a party from being imprisoned at all; or where by positive operation of law, a surrender is prevented. So that there can be no doubt that the present plea is a good bar to the suit, notwithstanding there has been no surrender, if by the law the principal could not, upon such surrender have been imprisoned at all."

We think these principles are applicable to the case be-

fore us. If the surrender of the principal is excused by virtue of insolvent laws whereby he is rendered not liable to imprisonment, we think the act of *God*, rendering it physically impossible to make the surrender, is an equally valid excuse.

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But the case of *Mather v. The People*, 12 Ill. R. 9, is directly in point. That was a case where, as in the present, a forfeiture had been taken, and the surety pleaded the death of the principal after the forfeiture. The statute of *Illinois* in relation to the right of the surety to surrender his principal after forfeiture, and before final judgment against himself on the recognizance, is similar to our own. Upon full examination, it was held that the plea was a good bar to the *sci. fa.* In concluding the opinion of the Court in the case, TRUMBULL, J., makes the following remark, which is equally applicable here, viz.: "The liability of the principal undoubtedly became fixed by the forfeiture of his recognizance, but the statute gives his security further time within which to discharge themselves, and of the benefit of this provision they ought not to be deprived by the death of the principal."

Per Curiam.—The judgment is reversed. Cause remanded for further proceedings not inconsistent with this opinion.

G. S. Orth and *J. A. Stein*, for the appellant (1).

J. L. Miller, for the state.

(1) Counsel for the appellant cited *The People v. Manning*, 8 Cow. 299; *Sparrow v. Lowgate*, W. Jones, 29; 1 Tidd's Pr. 238, 239; *Munnin v. Partidge*, 14 East, 599; *White v. Blake*, 22 Wend. 613; *Lewis v. Brackenridge*, 1 Blackf. 113; *White v. Guest*, 6 id. 228; *Beers v. Haughton*, 9 Pet. 330.

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DAILY v. THE STATE.

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In an indictment for stealing gold coin, to say *United States* gold coin, is the same as to say current gold coin of the *United States*, &c.; and where the several denominations and the value of such coin are alleged in dollars and cents, it may be presumed that the Court and jury will know that a coin of the value of ten dollars is an eagle, &c.

By the constitution, the jury are the exclusive judges of the law and the facts, in criminal cases, where they acquit; but they cannot pass upon the validity of the indictment. They judge the case from the evidence, in connection with such knowledge of the law as they may individually possess or acquire from the argument of counsel, and the instructions of the Court. If they acquit, the defendant is discharged. If they convict, then the Court rejudges the questions of law and of fact.

If the Circuit Court should sustain a conviction upon a bad indictment, the Supreme Court would set the defendant at liberty.

Thursday,
June 24.

APPEAL from the *Hendricks* Circuit Court.

PERKINS, J.—The grand jury returned into the *Hendricks* Circuit Court an indictment in these words:

“The grand jury of the state of *Indiana*, impaneled, charged and sworn to inquire in and for the body of *Hendricks* county, upon their oath present, that *William C. Daily*, on the tenth day of *January*, eighteen hundred and fifty-seven, at and in the county of *Hendricks* and state of *Indiana*, did then and there feloniously steal, take and carry away, two *United States* gold coins of the denomination and value of ten dollars, ten *United States* gold coins of the denomination and value of five dollars, and ten *United States* gold coins of the denomination and value of two dollars and fifty cents each,—altogether of the aggregate value of eighty-five dollars,—the personal goods and property of *Henry Carter*; contrary to the statute in such case made and provided, and against the peace and dignity of the state. *P. S. Kennedy*, Prosecuting Attorney.”

A motion was made to quash the indictment because, in describing the coin, it did not, in the usual phraseology, appropriate to the purpose, state it as so many “pieces of the current gold coin of the *United States of America*, called eagles, half-eagles and quarter-eagles,” &c.

The motion was overruled, and we think correctly. To

say *United States* gold coin, is substantially the same as to say gold coin of the *United States*; all such coin is current by law. And the Court and jury know that a *United States* gold coin of the denomination and value of 10 dollars is an eagle, &c. We regard the word "each" as referring to the several classes of pieces as though it were repeated after the naming of them severally. But if we are wrong in this, still the clause in the indictment in which the word is used contains a charge of grand larceny in itself, and hence the whole indictment could not have been quashed for the uncertainty in other charges contained therein.

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On the trial, the Court instructed the jury "that they had nothing to do with the question as to the sufficiency of the indictment; that the Court had determined that." To this instruction exception was taken. It is contended that it infringed the right of the jury to determine the law and the facts.

The right of the jury, in criminal cases, to determine the law and the facts, was the subject of long and earnest controversy in the *English* Courts. Under the *Tudors* and *Stuarts* the *British* government had become despotic, and oppressively restrictive of the rights of the citizen; and it desired to use the Courts in enforcing and perpetuating tyranny. It wished to punish citizens, as for the crimes of heresy, libel, treason, &c., in cases where the least freedom was exercised in the worship of *God*, or in speaking and writing upon the abuses of the government and the right of opposition thereto. Too many of the judges were eager, or willing, at least, to make the Courts instruments for carrying into execution the despotic will of the monarch. This they could not well accomplish without restricting the power of juries, as the members of those bodies naturally sympathized with their peers, the oppressed class from among whom they were selected. Hence, the necessity of limiting the province of the jury to a simple finding of facts, leaving the law to be pronounced by the judges. This enabled the Court, in every instance where any facts were found, to declare that upon the facts, the law adjudged

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the defendant guilty, or led it to compel the jury to so find in their verdict. In theory, the general doctrine above asserted, is correct; and where judges are honest and impartial, tends to the better administration of justice. The judges ought to be able to respond with more accuracy to the law than juries. But such was not the state of things formerly, in *England*. The judges were not always honest and impartial. They leaned to the side of tyranny, while juries leaned to the side of freedom. Hence, the advocates of popular rights insisted upon the right of the jury to determine, both what facts were proved in the case, and whether, in point of law, they constituted a crime; in other words, to determine the facts proved, and the law arising upon the facts, and thus be enabled to acquit the accused independently of the judges. Particularly was this so in cases of libels. 2 Blackf. 151.

This right—whether wisely or not, in the changed condition of things, it is not for us to say—has been secured to juries in this state by the constitution. Juries here, in criminal cases, have a right to determine the facts proved, and the law arising upon those facts, independently of instructions from the Court, in cases where they acquit, but not where they convict. We regard the new constitution as having to some extent enlarged the rights of the jury in this particular, (*Williams v. The State*, at this term,) (1) though, without the point being considered, this Court inadvertently intimated differently in the case of *Driskill v. The State*, 7 Ind. R. 339, a case rightly decided, however, upon its own facts. That such is the effect of the new constitution, is clear from the reasoning of Judge HOLMAN in 2 Blackf. 152. But the enlarged right of the jury does not extend to the indictment. They judge the whole case upon the evidence which goes to them from the witnesses, &c., in connection with such knowledge of the law as they may individually possess, and acquire from the arguments of counsel and the instructions of the Court. If they acquit, the defendant is discharged; but if they convict, then, in favor of liberty and life, the Court rejudges the questions

of law and fact. If the inferior Court should sustain a conviction upon a bad indictment, the Supreme Court would set the defendant at liberty.

As to the evidence in this case, we cannot say it did not justify the finding of the jury.

Per Curiam.—The judgment is affirmed with costs.

Judge HANNA concurs in the conclusion, but dissents from the reasoning, in this case.

C. C. Nave and J. Witherow, for the appellant.

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(1) *Ante*, 503.

JEWETT v. THE LAWRENCEBURGH AND UPPER MISSISSIPPI
RAILROAD COMPANY.

In this case a written subscription of stock in a railroad company was shown to have been conditional by parol evidence. Notice had been given, and an order of Court made, to obtain the production of the subscription on the trial; but it was not produced. The question as to the admissibility of such evidence was not presented in this Court. *Held*, that the evidence was entitled to full weight.

The condition in the subscription in this case was, that the road should be located within 20 rods of *St. Omer*. *Held*, that the meaning was, that the road should be constructed to run within 20 rods of *St. Omer*.

Where a subscription is made upon such a condition, the subscriber is not a stockholder, and consequently not liable upon his agreement, until the condition is performed; and whether it has been performed is a question of fact. Where a conditional subscription was paid, by the transfer of land to the company, before the condition was performed, and the company failed to construct the road according to the condition, but transferred the land to an innocent purchaser,—*held*, that in a suit by the subscriber against the company, the measure of damages would be the value of the land at the time it was transferred to the company.

And where the complaint alleged that the company after failing to perform such condition, appointed commissioners to settle with the plaintiff and others similarly situated, who, after an examination on behalf of the company, executed and delivered to the plaintiff an agreement that the company should refund the amount paid on the subscription, with interest, &c.:—*Held*, that the plaintiff might prove the amount of such conditional stock subscribed by others; the amount paid in; the acts of the commissioners in awarding

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repayment of such amounts to other conditional subscribers; and the payment by the company of the sums so awarded.

APPEAL from the *Decatur* Circuit Court.

HANNA, J.—*Jewett* sued the company to recover back a sum of money paid, and the price of a tract of land conveyed to the company, in payment of his subscription for stock.

The first count alleges that the subscription was made on the condition that the road should be located within 20 rods of *St. Omer*, and the money and property given for the stock, expended between *St. Omer* and *Greensburgh*; that after the subscription was made, the company located their road within that distance from *St. Omer*, and commenced working on it, and that afterwards the plaintiff paid for his stock; that subsequently the defendants abandoned that route and located and constructed the road on another, distant over one mile from *St. Omer*; that defendants have conveyed the land, which the plaintiff conveyed to defendants in payment for stock, &c., and avers a demand, &c. This paragraph also alleges that there was subscribed 600 shares, or 30,000 dollars, by various persons, of such conditional stock; that the subscribers presented and tendered it to defendants upon the fulfillment of the said conditions; that the same was by the defendants received, and acted upon, by pretending to locate, &c.; and that they assured plaintiff that the condition should be performed, and he thereupon paid, &c.

The second count, in addition to the above, states that after the abandonment of the old route, the defendants appointed commissioners to settle with the plaintiff, and others similarly situated; and that the commissioners, after examining into the matter, for and on behalf of the company, executed and delivered to the plaintiff an agreement, which is as follows:

“The undersigned commissioners of the *L. and U. M. Railroad Company*, appointed to settle with subscribers of special stock at *St. Omer*, hereby agree that *David Jewett* shall be refunded the amount that he may have paid on

his subscription of said special stock, with interest, on the 1st day of *October* next, and be released from any further payment on said subscription. Oct. 1st, 1852, (40 shares).
[Signed,] *J. G. Monfort, Jas. B. Foley, A. R. Forsyth, Jas. Hamilton.*"

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The defendants demurred to the complaint, which demurrer was overruled, and said defendants answered over. The plaintiff replied.

The case was tried by the Court. Motion for a new trial overruled, and judgment for defendants.

It appears that on the trial the plaintiff offered to prove that the defendants had paid to other persons about *St. Omer* the amounts awarded them by said commissioners, for the purpose of showing their authority to bind the defendants, and that the evidence was rejected; also that the plaintiff offered to prove the amount that had been conditionally subscribed and paid in by persons in and about *St. Omer*, before the abandonment of the first route by the defendants, which was also rejected.

Several questions arise upon this record:

First. Was the subscription by the plaintiff conditional?

The evidence shows that it was; that it was accepted by the defendants, the road located on the line designated by the condition, some work done on it, the subscription of plaintiff paid in money and land, and that the defendants then abandoned that particular route. But it is objected that the conditions and terms of the subscription were shown by improper evidence, to-wit, by oral testimony, such subscription, &c., being in writing. This, together with other subscriptions about *St. Omer*, was made for a specific purpose, to-wit, to obtain the location of the road at that point, and was not of the general subscriptions which were unconditionally made to the capital stock of the company. The evidence shows such subscriptions to have been made on a paper prepared by the president of the road and sent to their agent, who after obtaining the signatures, &c., redelivered the same to the president. Notice had been given, and even an order of Court made, to obtain the production of the paper on the trial. It was

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not produced. The proof was made by oral evidence of these facts, and must now have its due weight, there being no cross-errors assigned, which would enable us to pass upon the question whether the evidence was properly admitted or otherwise; upon that point we do not decide.

Secondly. Have the defendants complied with the condition?

The condition, as proved, was, that the road should be located within 20 rods of the town of *St. Omer*. In this case the language employed certainly means, that when the road was constructed it should be within that distance of this town. The evidence shows that the road is, in fact, constructed one and a half miles distant therefrom. Is this a substantial compliance?

In the case of *The Evansville, &c., Co. v. Shearer*, at this term, we have decided, that, where a subscription is made upon the express condition that the road shall be constructed in a particular place, the subscriber could not be a stockholder, and consequently not liable on the agreement, until the performance of the conditions upon which the subscription was made; and whether they have been performed is a question of fact (1).

Thirdly. Did the failure to perform the condition, upon which the subscription was made, give the plaintiff a right of action against the defendants to recover back the amount paid thereon before the violation thereof?

This is the principal question in the case. The appellee insists that the payment of the subscription before the condition was performed, was an abandonment of that condition, and "placed the plaintiff upon the same footing with other stockholders." Upon the other hand, it is insisted that the location and construction of the road at a particular place, entered largely into the consideration for the payment made; that the expectation of receiving shares of stock in the corporation was not the sole consideration for the transfer of the lands and payment of money, as alleged. It is further urged that, even admitting the plaintiff might have had a legal defense against the payment of his subscription, on account of the non-performance by the

defendants of the condition upon which it was made, yet having failed to make that defense, and having voluntarily paid the same, he cannot now sue for and recover it back.

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In contracts concerning real estate, it has often been held, that where the purchaser had paid the purchase-money and taken possession of the property, he might surrender that possession, disaffirm the contract and sue for and recover the purchase-money, upon the neglect or inability of the vendor to make a title and execute his contract. *Bank of Columbia v. Hagner*, 1 Peters, 468, 7 Curtis, 667.—Sugden on Vendors, 173.

A late writer says that, "Generally, where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded. 2 Pars. Cont. 191.

Then, upon the failure of the company to perform the conditional part of the contract, the plaintiff had the right to rescind, or treat the contract as held for nought by the company, and sue for the amount paid on the contract; and where, as in this instance, the payment was by the transfer of lands, that transfer might, perhaps, be set aside before such lands had passed into the hands of innocent holders—but it is not necessary to decide that question as these lands have so passed—and we suppose the plaintiff, if upon the whole he is entitled to recover, should be permitted to recover the value of the lands at the time he transferred them to the company.

Fourthly.—Did the Court err in refusing to admit the evidence offered by plaintiff? That evidence was to show the amount of conditional stock at *St. Omer*; the amount paid in; the acts of *James B. Foley* and others, styled commissioners, in awarding repayment by the defendants of the sums so paid in; and the acts of these defendants in making such repayments in pursuance of such awards.

The fact that the defendant had ratified similar acts of the persons who assumed to be acting for the company, might have tended to show that they had authority to make such an arrangement with this plaintiff as they did make. Story on Agency, §§ 55, 87.—Redf. Railw. 292.

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In showing that such acts had been ratified, it was proper to prove the number of similar instances in which arrangements had been made and approved by the defendants, and the amount that had been paid thereon. If the instances were numerous and the sums large, the inference would be the stronger. The evidence offered in relation to the acts of *Foley* and others, and the ratification thereof, should have been admitted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

DAVISON, J., was absent.

J. S. Scobey and *W. Cumbach*, for the appellant.

J. Ryman, for the appellees.

(1) *Ante*, 244.

FILSON v. BLEEKER and Others.

Thursday,
June 24.

APPEAL from the *Huntington* Court of Common Pleas.

Per Curiam.—This was a proceeding by the appellees against the appellant, under the provisions of article 23, 2 R. S. p. 152, to reach property and effects in the hands of the defendant, to satisfy a judgment held by the plaintiffs against the defendant. Upon issue joined, the Court found, upon trial, that the defendant was indebted to the plaintiffs by judgment, &c.; that an execution had issued and been returned no property; and that there was in the possession of the defendant, and under his control, certain property subject to execution, and choses in action. And the Court made an order in compliance with § 524 of the article above cited.

There was no motion for a new trial. Hence, we cannot determine as to the correctness of the finding of the Court. *The State ex rel. Foster v. Swarts*, 9 Ind. R. 221.

The judgment is affirmed with costs.

J. P. Greer, for the appellant.

J. R. Slack, for the appellees.

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CHANDLER
v.
GREGORY.

THE BOARD OF COMMISSIONERS OF HUNTINGTON COUNTY
v. BROWN.

APPEAL from the *Huntington* Court of Common Pleas. *Thursday, June 24.*

Per Curiam.—This was a proceeding involving the same questions that have already been decided at this term in a case of the same appellants against *Weasner*; and for the reasons therein given the judgment is reversed at the cost of the appellee (1).

J. U. Pettit and *C. Cowgill*, for the appellants.

(1) *Ante*, 259.

CHANDLER v. GREGORY and Another.

This case is decided upon the evidence.

APPEAL from the *Warren* Court of Common Pleas. *Thursday, June 24.*

Per Curiam.—Suit by *Robert A. Chandler* against *Benjamin F. Gregory* and *William M. Haynes*. The complaint is that on, &c., at, &c., said *Gregory* and one *McAlilly* had a judgment, and execution thereon, against the *Williamsport Canal Lock Company*; that said *Gregory* and *Haynes* promised the plaintiff, *Chandler*, that if he would undertake to pay a part of said judgment, to-wit, &c., on a certain day, they, the defendants, would pay the amount at that time for said plaintiff; that he, the plaintiff, did so

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undertake, whereupon the execution on said judgment was returned, &c. The complaint further alleges that at the time, &c., said defendants did not pay, &c., and that plaintiff was compelled to and did pay, &c., and this suit is to recover the amount from said defendants.

Answer in denial. Trial, and judgment for the defendants.

It appears in evidence that there was an execution, as alleged, against said lock company; that said *Chandler* and *Gregory* were both members and directors of said company, and interested in preventing a sale of the property of the company on execution. Mr. *Gregory*, a witness, says: "On the 20th day of *July*, 1855, *McAlilly* and myself had a judgment against said lock company on which execution had issued. *McAlilly* proposed that if the company would pay 100 dollars, he would take *Chandler's* note at one year for the balance, return the execution, and assign the judgment to *Chandler*, who might collect the money as he could from the company. Witness and *Haynes* made the proposition to *Chandler*, but refused to become liable to him for the repayment of the money. They told him there was some, and would be more, money in the treasury of the lock company which said *Haynes*, who was treasurer, might pay on the claim, whereupon *Chandler* gave his note, &c.

It further appears that a payment had been ordered by the directors, on claims against the company which might be presented; that *Chandler* refused to present his, and hence, the money in the treasury was applied on other claims that were presented.

Mr. *Chandler* has filed a very elaborate brief to show that the promise alleged in the complaint is not within the statute of frauds; but the case was rightly decided below for the defendants on the ground that that promise was not proved to have been made. It is plain that Mr. *Chandler*, who was a director in the company and knew the state, and prospects of the treasury, and the power and duty of the treasurer, and was interested in preventing a sacrifice of the property of the company, gave his note upon his confidence in the revenue of the company.

The judgment is affirmed with costs.

R. A. Chandler, for himself.

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B. F. Gregory, J. Harper and J. R. M. Bryant, for the
appellees.

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CRULL.

HANNA and Another v. McKIBBEN.

APPEAL from the *Wabash* Court of Common Pleas. *Thursday, June 24.*

Per Curiam.—Suit against two persons to recover a demand which accrued against them as partners. The suit was commenced after a dissolution of the partnership had taken place.

On the trial, the admission of one of the defendants, made after the dissolution of partnership, touching the accruing of the claim against the firm, was given in evidence, over the objection of the other partner.

The admissions of each partner, thus made, were good, at all events, against himself. Hence, the evidence in this case was rightly admitted to charge the person making the admission. The record does not show that it was used for any other purpose, if it could have been—a point we do not decide.

The judgment is affirmed, with 1 per cent. damages and costs.

H. P. Biddle and B. W. Peters, for the appellants.

ZEHNOR v. CRULL.

APPEAL from the *Wayne* Circuit Court.

Thursday, June 24.

Per Curiam.—This was an action by *Crull* against *Zehnor* upon promissory notes for the payment of 207 dollars. The defendant's answer contains three paragraphs. The

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first is a general denial. The second and third set up new matter in defense of the action, to which the plaintiff replied. Defendant demurred to the replies; but his demurrers were overruled. Verdict for the plaintiff. New trial refused, and judgment.

The action of the Court in overruling the demurrers is assigned for error; but as no exception to that ruling appears to have been taken in the Circuit Court, the objection to the replies cannot be raised in this Court. 8 Ind. R. 96.—9 *Id.* 117. Another objection is raised to the ruling of the Court, by assignment of error; but the appellant has failed to notice the point made in a brief; hence it will be considered as waived. Rule 28.—Ind. Dig. 722.

The judgment is affirmed with 5 per cent. damages and costs.

O. P. Morton, J. Kibbey, M. Wilson, C. H. Test, and J. M. Wilson, for the appellant.

J. S. Newman and J. P. Siddall, for the appellee.

THE EVANSVILLE, INDIANAPOLIS AND CLEVELAND STRAIGHT
LINE RAILROAD COMPANY v. TRESSLER.

Friday,
June 25.

APPEAL from the *Johnson* Circuit Court.

HANNA, J.—This was an action on a written conditional subscription of stock. The complaint avers performance by the plaintiffs of the condition, &c. Upon the trial the plaintiffs—the bill of exceptions shows—offered the written subscription in evidence, and also certain extracts from the records of the corporation, for the purpose of showing performance of the condition. It then states that the reception of the evidence was “objected to by the defendant, and the objection sustained by the Court.”

Whether the objection applied to the whole of the evidence offered, or only to the extracts from the records, is made a question of discussion by counsel. If the objection

really applied to the offer to introduce the written subscription, which we are inclined to think it did, so far as we are informed by the record, then the cause of objection is so manifest that we would not require it to be specifically pointed out.

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DOUGHERTY.

The writing was the foundation of the suit, and a copy was filed with the complaint, and no verified answer was filed. We cannot conceive of any valid objection to its admission under the pleadings.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

O. H. Smith, for the appellants.

THE JEFFERSONVILLE RAILROAD COMPANY v. DOUGHERTY.

APPEAL from the *Bartholomew* Circuit Court.

Friday,
June 25.

Per Curiam.—The same question is raised in this case as in that of *The Indianapolis and Cincinnati Railroad Co. v. Townsend*, at the last term, in regard to the liability of the company for stock killed, the owner of which was not a proprietor of land, &c.; and as to that point, this case is governed by that (1).

The judgment for the plaintiff was for the value of the animal, and also for a docket-fee of five dollars. As to that amount the judgment is erroneous. If that amount, to-wit, 5 dollars, is remitted, the judgment will be affirmed; if not, it will be reversed. 8 Ind. R. 217.

W. Herod and *S. Stansifer*, for the appellants.

(1) *Ante*, 38.

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KEGG and Others *v.* WELDEN.

JELLY
v.
RICE.

Friday,
June 25.

APPEAL from the *Whitley* Circuit Court.

HANNA, J.—This was a proceeding to set aside a deed as fraudulent, &c.

The deed was made by *Kegg* to *James* and *Emanuel Graham*.

There was a return of not found as to *James Graham*, and an order made by the Court that publication be made, &c.

There appears to have been a general demurrer filed by the defendants, which was not, so far as the record shows, disposed of in any way.

The defendants were called, and a decree or judgment rendered as upon a default, without service on, or notice to, *James Graham* being shown by the record.

It is insisted that the Court had no jurisdiction of the person of said *James*. This is a mistake. There was full appearance made when the demurrer was filed; but entering a judgment without having first disposed of the demurrer was erroneous.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

W. March, for the appellants.

JELLY *v.* RICE.

Friday,
June 25.

APPEAL from the *Ohio* Court of Common Pleas.

Per Curiam.—This case is affirmed—the question turning on the evidence. There is some evidence tending to support the verdict of the jury.

The judgment is affirmed, with 1 per cent. damages and costs.

J. S. Jelly and *D. S. Major*, for the appellant.

THE EVANSVILLE, INDIANAPOLIS AND CLEVELAND STRAIGHT
LINE RAILROAD COMPANY *v.* STRINGER.

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PATTERSON
v.
THE STATE.

APPEAL from the *Pike* Circuit Court.

Per Curiam.—This was a proceeding similar to that of the same appellant against *Fitzpatrick*, decided at this term, and substantially the same questions arise upon the admission of testimony; and for the reasons given in the case cited the judgment in this case is reversed with costs (1). *Friday,*
June 25.

O. H. Smith, for the appellants.

(1) *Ante*, 120.

PATTERSON *v.* THE STATE.

APPEAL from the *Wells* Court of Common Pleas.

Friday,
June 25.

Per Curiam.—Prosecution for assault and battery. Conviction, &c. In the record there is what purports to be a bill of exceptions, wherein it is stated that the defendant moved in arrest of judgment; but his motion was overruled. The bill, however, does not appear to have been signed by the judge and filed by the clerk; hence its statements, as to the rulings of the Common Pleas, are not properly before us. 2 R. S. p. 377, § 120. And as the only error assigned relates to the refusal of the Court to sustain the motion in arrest, the judgment must be affirmed.

The judgment is affirmed with costs.

J. P. Greer, for the appellant.

A. White, for the state.

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VERDEN v. COLEMAN.

RUBOTTOM

v.
HOLLAND.

Saturday,
June 26.

APPEAL from the *Benton* Circuit Court.

Per Curiam.—The facts of this case, and the questions of law arising in the record before us, are precisely similar to those in a case between the same parties, decided at the *November* term of this Court, 1853. See *Verden v. Coleman*, 4 Ind. R. 457. Upon the authority of the case cited, the judgment in the present case must be affirmed.

The judgment is affirmed, with 1 per cent. damages and costs.

D. Mace and *W. C. Wilson*, for the appellant.

Z. Baird, for the appellee.

DRONBERGER v. MURPHY.

Saturday,
June 26.

APPEAL from the *Bartholomew* Circuit Court.

Per Curiam.—This case is dismissed with costs for want of an assignment of errors.

RUBOTTOM v. HOLLAND.

Saturday,
June 26.

APPEAL from the *Franklin* Court of Common Pleas.

Per Curiam.—The judgment in this case is affirmed with costs, on the case of *Collins v. Shaw*, 8 Ind. R. 516.

J. D. Howland, for the appellant.

G. Holland, for himself.

THE STATE on the relation of *Long v. Ewing*.

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APPEAL from the *Jackson* Circuit Court.

ORR
v.
WORDEN.

Per Curiam.—Final judgment below upon a demurrer sustained, and no exception taken. There is no question before this Court. *Saturday, June 26.*

The judgment is affirmed with costs.

C. L. Dunham and *F. Emerson*, for the appellant.

ORR v. WORDEN.

APPEAL from the *Switzerland* Court of Common Pleas. *Saturday, June 26.*

Per Curiam.—This was an action commenced before a justice of the peace, by *Joseph Orr*, upon an account which *Worden* had made with *John Orr*, and which was by him assigned to *Joseph*, without recourse.

The plaintiff had judgment before the justice. The defendant appealed to the Common Pleas, where, on motion, the case was dismissed. The reasons for the motion were filed in writing, which were, that the suit was based upon an assigned, open, unliquidated account, and that the same was not assignable so as to enable the assignee to sue in his own name.

The dismissal, it appears by an entry, was excepted to, but no bill of exceptions was taken.

The written reasons, which the party saw proper to file for his motion to dismiss, were not a necessary part of the record to be made by the clerk, and could only be made so by a bill of exceptions. As no such bill was taken, the reasons for the dismissal are not legally before us, and we will presume that the ruling was right (1).

The judgment is affirmed with costs.

S. Carter, for the appellant.

R. N. Lamb, for the appellee.

10	558
Case 2	
158	800

(1) See 2 Blackf. 338, 402; 3 id. 362.

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10	554
134	161
136	409

10	554
140	652

10	554
163	622

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.
LOVE.

In a suit against a railroad company, by an employè engaged as an engineer in running a train upon the road, to recover for injuries sustained in such service, the plaintiff must allege and prove negligence on the part of the company, by means whereof the injury was caused.

There is no implied warranty, generally, of the completeness or fitness of the road or rolling stock, as between the company and their employès.

But there are many exceptions. For instance, if a defect existed in the road which was known to the company, but which it was impossible for them to remove immediately, and in consequence of such defect the road was unsafe but not impassable, and yet they should suffer an employè, in ignorance of the defect, to attempt to pass upon the road, and injury should thereby result to him, the company would be liable. So, on the other hand, if the employè had knowledge of the defect, and the employers had not, the latter would not be liable. And where both parties had such knowledge, each takes the risk, unless the company undertake to give special directions as to the mode of operating.

Whether it is the duty of the company or of their engineer to see to and keep in safe condition a crossing, or other unsafe point on a railroad, is a question of fact for the jury.

It seems, that where an injury to an employè of a railroad company resulted from his own negligence or carelessness, in failing to discharge some reasonable duty; or where the employè and the company were equally to blame for the injury, the company is not liable.

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June 26.

APPEAL from the *Shelby* Circuit Court.

HANNA, J.—*Love* sued the appellants, and alleged that on the first of *March*, 1854, he was in the employment of the said company as engineer, and whilst so engaged in running an engine, &c., the same “ran off the track, in spite of the reasonable care and diligence of the plaintiff, and which running off was in consequence of the imperfect and insufficient connection of the track where the said track crossed other tracks—the defendants being bound to keep said track in good running condition;” and that his leg was unavoidably crushed, &c.

Demurrer to the complaint, assigning two causes—

1. That it does not state facts sufficient, &c.
2. That it shows that the plaintiff was in the employment of the defendants, &c.; and therefore, &c.

The demurrer was overruled, and the defendants there-
upon answered in four paragraphs.

Reply filed. Trial by a jury. General verdict for the
plaintiff; and also, at the request of the defendants, a spe-
cial finding upon particular questions of fact. Motion for
a new trial overruled. Judgment for the plaintiff for 3,000
dollars.

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LOVE.

The first error assigned is upon overruling the demurrer
to the complaint. The appellants contend that the plain-
tiff being in the employment of the company as an engi-
neer in running a train over their road, he must be presumed
to know the condition of the road, and to have undertaken
to run the risk. To this proposition the plaintiff replies
that his theory of the case is that the defendants employed
him as engineer to run a locomotive on a track reasonably
fit and safe for the purpose, and by the contract of hiring
it was implied and contemplated that he would take all the
necessary and incidental risks of that particular service,
whilst it was implied and contemplated that the defend-
ants should furnish a track embracing bridges, culverts,
switches and crossings reasonably fit and safe for the pur-
pose.

It is further argued by the appellants, that the complaint
should not only aver that the defendants had knowledge of
the condition of the road, but should also negative a like
knowledge on the part of the plaintiff. To this, the plain-
tiff answers that this is, so far as it can affect the case, a
matter of defense which the plaintiff is not bound to anti-
cipate in his pleadings.

We think the demurrer should have been sustained for
the first cause assigned.

In a suit against a railroad company by an employè en-
gaged in running a train upon the road, for injuries sus-
tained in such service, the proposition is so reasonable that
he should be required to allege and prove negligence upon
the part of the company, by means whereof the injury was
brought about or caused, that we cannot conceive any other
rule would be equally just between the parties.

We do not, as is insisted in argument, think that there

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is any implied warranty, generally, of the completeness or fitness of the road or rolling stock, as between the employer and employè.

It is almost impossible to lay down any general rule upon the subject, that circumstances might not exist making a case an exception to. For instance, as a partial exception to the above proposition, if a defect existed in the road which was known to the company, but which it was impossible for them to immediately remove or remedy, and in consequence thereof the road was unsafe but not impassable, and yet they should place an employè upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability. So, to the reverse, if the employè had knowledge of the defect, and the employer had not, we suppose such employer would not be liable. And a still more difficult question would be presented where both parties had this knowledge, and injury should result from an attempt to operate the road. In this latter instance we think the true rule of decision is, that each party takes the risk, unless the employer undertakes to give special directions as to the mode of operating. Then, if, in following those directions, injury should result, by reason of adhering to such directions, liability would attach.

The reason in such cases is, that upon knowledge being brought home to the employè that a cause exists making the service more than ordinarily unsafe, he is at liberty to require the cause to be removed, or defect remedied, and if that were not done, he might quit the service without incurring loss or legal liability. But if instead of removing the cause or applying the remedy to the defect, the employer undertakes to give special directions, &c., he would thereby assume the risk, whilst the employè was in the discharge of those directions.

It follows, therefore, that the complaint is insufficient, if for no other reason, because of the want of an allegation of negligence or want of care upon the part of the company in the construction of the road, or that they had knowledge or notice of its imperfection, and notwithstanding

continued to use it, or some averment equivalent to, such charge of negligence. May Term,
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The imperfect connection of the track might have existed in consequence of internal and invisible defects in the materials employed, which had escaped the closest scrutiny and set at naught the exercise of the utmost care and diligence of the company. THE INDIAN-
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The second cause assigned in the demurrer is based upon the assumption, attempted to be maintained in the brief, that an employè cannot recover of his employer for injuries received whilst in such employment.

The proposition is too broad. There are many cases in which such actions have been maintained—among others the following: *Fitzpatrick v. The New Albany, &c., Railroad Co.*, 7 Ind. R. 436; *Gillenwater v. The Madison, &c., Railroad Co.*, 5 id. 339; *The L. M. Railroad Co. v. Stevens*, 20 Ohio R. 415; *Keegan v. The Western Railroad Co.* 4 Selden, 175; *Noyes v. Smith*, 28 Vermont R. 59. And see *Redfield on Railways*, 387. 4 sect. 47 Contn

The next error assigned is upon the ruling of the Court in giving and refusing instructions. The instructions asked and refused are, in many particulars, similar to those given. Such refused instructions will not therefore be noticed in detail. One position assumed by defendants, and which was not covered by the instructions given, was, that if the crossing was unsafe except at slow speed, and known to the plaintiff to be so, it was his duty, as engineer and manager of a train, to see "that the track, the movable chairs and rails at that place were in their proper place and as safe as they could be made by putting the movable rails and chairs carefully in their proper places, and if plaintiff failed to do so, and ran his train on the crossing without knowing whether the movable rails and chairs were properly placed or not, &c., he would be guilty of negligence, and could not recover."

Instead of the above instruction, the principle of which was asked in several forms, the Court told the jury that it was proper for them to determine from the evidence whose duty it was to keep the track in proper order at the cross-

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ing, and if they found that it was the duty of the defendants to do so, and not the duty of the plaintiff, and if the plaintiff exercised due care and skill, &c., and had good reason to believe that the chairs and rails were in a safe condition, &c., then the plaintiff would be entitled to recover, if the crossing was unsafe, &c.

In effect, the instruction given assumed that it was a question of fact for the jury to determine whether it was the duty of the plaintiff to do certain things, whilst that refused treated it as a question of law, fixing the duty upon the plaintiff.

There were other instructions asked by the defendants and refused, to the effect that if the plaintiff by his carelessness or negligence contributed to produce the injury, he could not recover.

The instruction given upon this point was, that if the injury was brought about by the carelessness or negligence of the plaintiff in failing to discharge any reasonable duty; or if the plaintiff and defendants were equally to blame for the injury, the finding should be for the defendants.

The facts, as shown by the evidence, upon which these questions arose, were, in substance, that the defendants, in the construction of a railroad, crossed the tracks of two other railroads, where the tracks of those roads were near to each other, and near their junction—so near that one rail would reach across both tracks; that for some weeks previous to the injury complained of, the locomotive, cars, &c., of the defendants had been run across and over the tracks of the other two roads several times each day, by means of detached rails which could be taken up and laid down at pleasure, and secured, so far as they were secured, by a wrought piece of iron, called a chair, at each end; that they were put down to pass the cars, &c., of defendants, and removed that they might not obstruct the passage of cars, &c., on the other two roads; that the plaintiff, who was the engineer in charge of a construction train—there being no conductor on it—had passed this crossing in this manner with his train many times.

The evidence was conflicting as to whether such mode

of arranging a crossing was safe at any time, under the most favorable view of it; and it was also conflicting as to the duty of the engineer, having in charge a locomotive, in reference to the examination of the manner in which the rails were placed and fastened at each time he might cross. There was also some slight conflict as to whether the plaintiff had, at the particular time of the injury, approached the crossing in the most skillful and careful manner.

It was a question of fact, for the jury to determine from the evidence, whether it was a duty incumbent upon the plaintiff to see to and maintain the road, at that particular point, in proper order. The ruling of the Court upon instructions involving that point was therefore correct.

The instruction asked and refused upon the subject of negligence, did not embody the law, for the reason that it would prevent a recovery if the plaintiff had contributed, however remotely, to produce the injury, by his negligence, notwithstanding it might have been produced by the immediate carelessness of the defendants. The instruction given is nearer the rule laid down by this Court in the case of *The Indianapolis, &c., Railroad Co. v. Caldwell*, 9 Ind. R. 298.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

DAVISON, J., was absent.

W. J. Peaslee and *J. Ryman*, for the appellants.

M. M. Ray, for the appellee.

(1) Mr. *Peaslee* cited the following authorities: The plaintiff being in the employment of the company as an engineer in running a train over the road, he must be presumed to know the condition of the road, and to have undertaken to run the risk. 4 Met. 49.—*Farwell v. The Boston, &c., Railroad Co.*, id. 36.—1 Am. Railr. Cases, 339.—*Hayes v. The Western Railroad Co.* 1 Am. Railr. Cases, 564, 568, and notes.

(2) Mr. *Ray* cited the following authorities: The master may be liable to his servant for an injury resulting from the negligence of the master. 24 Vt. R. 487.—4 Seld. 175.—5 Ind. R. 467.—19 Conn. R. 566.—5 Ind. R. 339.—7 Ind. R. 474.—13 Ill. R. 585.—15 id. 468.—3 Ohio R. (N. S.) 201.—16 Barb. 353.—7 Ind. R. 437.

If the fault be equal the servant cannot recover; and the degree of negligence in either master or servant, or both, is a question for the jury. 5 Ad. & El.

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THE EVANSVILLE, INDIANAPOLIS AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY v. COCHRAN.

Two of the questions arising in this case were decided in the case of the same company against *Fitzpatrick*, *ante*, 120.

In a proceeding by a railroad company to appropriate lands for a right of way, the statements of witnesses touching the value per acre of the lands appropriated, are admissible.

Where the jury, in such a case, were sent to examine the premises, and the record contained nothing in relation to the impression produced upon the minds of the jury by the examination,—*held*, that the evidence was not all in the record, though the bill of exceptions stated that it contained it all.

Evidence is that which produces conviction on the mind, as to the existence of a fact.

An ocular examination of the premises alleged to have been injured, might, in this instance, have that effect, as well as an oral detail of circumstances.

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June 26.

APPEAL from the *Pike* Circuit Court.

HANNA, J.—This was a proceeding under the statute by the railroad company, to appropriate lands for the right of way, &c. Appraisers were appointed, whose report was, upon written exceptions thereto filed by the land-owner, set aside, and a trial by a jury had, which resulted in a verdict and judgment for defendant of 300 dollars.

There are several errors assigned.

The first is upon the reception of evidence.

The questions asked, to which objections were made, were as to the necessity devolved upon the defendants, by the construction of the road, to make additional fences, and the amount thereof. This, and a kindred question growing out of instructions as to the same point, were considered in the case of the same appellants against *Fitzpatrick*, at this term (1).

The next error assigned is, in regard to the rulings of the Court in giving and in refusing certain instructions relative to benefits or injury to the land-owner by the construction of the road, &c. An exposition of the law upon these points was also given in the case referred to. We see no reason to change our rulings in that case.

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It is insisted that the statements of witnesses as to the value per acre of the land appropriated, were improperly admitted. We do not think so. There is manifestly a difference in stating the value of an article as a fact, and giving an opinion as to the amount of unliquidated or consequential damages, &c.

The last error assigned is, in overruling the motion for a new trial. Upon this the question is attempted to be raised as to the sufficiency of the evidence to sustain the finding as to the amount of damages. Although the bill of exceptions states that it contains all the evidence, yet in point of fact it shows it does not, for the reason that the jury were, as authorized by the statute, sent to examine the premises, and there is nothing in the record relative to such examination—that is, in regard to the information conveyed to their minds by such examination. Evidence is that which produces conviction on the mind as to the existence of a fact. An ocular examination of the premises alleged to have been injured might have that effect, as well as an oral detail of circumstances, in this instance.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

O. H. Smith, for the appellants.

A. P. Hovey and *R. A. Clements*, jun., for the appellee.

(1) *Ante*, 120.

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LAWTON v. SWIHART.

LAWTON
v.
SWIHART.

A bill of exceptions filed at a term subsequent to that at which the alleged errors were committed, and not showing that time was then given to prepare it, is too late to avail the party taking it upon appeal.

A. sued B. upon three promissory notes, alleging in the complaint, that B. "made his promissory notes," &c. Upon the trial A. offered in evidence three notes, signed—"C. by B." Upon objection they were excluded because they did not tend to prove the averment. *Held*, that this was right.

Saturday,
June 26.

APPEAL from the *Allen* Circuit Court.

HANNA, J.—This was a suit commenced upon three promissory notes, previous to the adoption of our new code of procedure, and tried after its adoption. Finding and judgment for the defendant.

The record shows that a bill of exceptions was taken at the *May* term, 1855, of the Court, for several alleged errors, and among others for refusing to permit the plaintiff, at the *August* term, 1854, to amend his declaration. The record does not show that time was given to prepare a bill of exceptions. It was therefore too late to take a bill at the time this was procured and filed. 2 R. S. p. 115. —*Mills v. Simmonds*, at this term (1).

The plaintiff offered in evidence three notes signed "*H. L. Ellsworth*, by *Henry Swihart*." The evidence was objected to and excluded. This was right, the averment in the declaration was in the usual form, that defendant had "made his promissory notes," &c. The evidence offered was the notes of *Ellsworth*, so far as appears, and did not tend to prove that averment. We do not think he could, under the issues upon which he went to trial, be permitted to prove that the defendant had no authority to make the notes, as agent, and by that means attempt to fasten individual liability upon him. If he had desired to avail himself of that proof, he should have asked leave to amend his pleadings, and that would have presented the question whether he ought to have been permitted to make the amendment—a question we do not decide, as it is not before us.

Per Curiam.—The judgment is affirmed with costs.

WORDEN, J., was absent.

R. Brackenridge, jun., for the appellant.

J. L. Worden, for the appellee.

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1858.

THE FORT
WAYNE, &C.,
TURNPIKE
COMPANY
v.
DEAM.

(1) *Ante*, 464.

THE FORT WAYNE AND BLUFFTON TURNPIKE COMPANY v.
DEAM.

10 563
155 66

Representations made by a person who is not the authorized agent of a corporation, in soliciting stock for it, though false, are not fraudulent so far as the corporation is concerned.

If a person contract with a company as a corporation, he is estopped from denying its corporate existence at the date of his contract.

A party may in such case show that such corporation has ceased to exist since he contracted with it; but, in that case, he must, in his answer, specify how it ceased to exist.

APPEAL from the *Wells* Court of Common Pleas.

Saturday,
June 26.

HANNA, J.—This was a suit to recover 100 dollars alleged to be due on subscription to the capital stock of said company.

The defendant answered—

1. That there was no such corporation.
2. That the subscription was obtained by fraud.
3. Failure of consideration.
4. That he is not indebted, &c.
5. That plaintiffs sold and assigned their interest in said subscription to, &c., and have therefore no interest, &c.

To this the plaintiffs replied—

1. That there was such corporation, &c.
2. As to the 2d, 3d, 4th and 5th paragraphs of the answer, special denials.

Trial; verdict and judgment for the defendant.

We do not think the evidence sustains the verdict in this case. It was shown that the defendant, among others, had,

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1858.

THE FORT
WAYNE, &C.,
TURNPIKE
COMPANY
v.
DEAN.

on the 2d day of *July*, 1852, subscribed for four shares of stock, of 25 dollars each, two payable in cash and two in timber and hauling, "in such manner, and at such times and proportions, as the president and directors of the *Fort Wayne and Bluffton Turnpike Company* may direct." It was further proved that on the 3d of *August*, 1852, at a meeting of the president and directors of said company, of whom the defendant was one, and present, it was resolved "that *John Studebaker* be authorized to collect the subscriptions," &c.; and it was further resolved that "the treasurer give the necessary notice to the subscribers, &c., that the whole of such subscription will be required to be paid at the end of 60 days." And it was then shown that the notice was published in the *Fort Wayne Sentinel*, printed in *Fort Wayne*, in *Allen* county, *Indiana*, &c.

Two witnesses were introduced by the defendant—*Studebaker* and *Prillman*. Their evidence is set forth in narrative form, but from it we infer that the attempt was made to sustain by them the answer of fraud, &c. We do not think it even tends to do so. It shows great anxiety upon the part of certain citizens of *Bluffton* to procure the extension of the road to that town; the appointment of one of the witnesses to solicit stock for that purpose; his statement of his opinion that the road could be completed before "high water in the fall;" and the fact that it was not so completed. As no particular acts of fraud or false representations are pointed out, we suppose, from the testimony, that this is the point relied on. The evidence is not sufficient; for it shows that although at a meeting of the board and a portion of the citizens interested as stock subscribers, the probability of completing it was fully talked over, yet the board did not agree to finish it in three months, or any specified time. Therefore, representations made by a person soliciting stock could not be, as to them, fraudulent, especially when that solicitor testifies that, he "was not acting as the agent of, or by or under the direction and instruction of, said company, but was acting by the direction of the citizens of *Bluffton*," &c.

But it is insisted that there was no evidence by the plain-

tiff, of the existence of the corporation at the time the suit was instituted. May Term,
1858.

By contracting with the plaintiff as a corporation, the defendant is estopped from denying its existence as such at the time of the contract. 8 Ind. R. 392.—7 *id.* 416.—4 *id.* 333.

LAMB
V.
RAWLES.

If by this paragraph of the answer the defendant intended to set up that the corporation had ceased to exist after the contract was made, it should have averred the facts showing how the corporate powers come to a termination. 2 Blackf. 367.—5 Ind. R. 77.—8 *id.* 393. It would, therefore, have been bad if demurred to; and if viewed as an affirmative answer of that character, as the defendant insists it should be, then the burden of proof was on the defendant to sustain it, after the issue of fact joined upon it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Case and *W. H. Withers*, for the appellants.

J. P. Greer and *W. March*, for the appellee.

LAMB v. RAWLES.

APPEAL from the *Fountain* Court of Common Pleas. Monday,
October 11.

Per Curiam.—The judgment in this case is affirmed with 1 per cent. damages and costs, upon the reasons given in *Cowdin v. Huff*, at the *November* term, 1857 (1).

S. C. Willson and *J. E. McDonald*, for the appellant.

J. Ristine, for the appellee.

(1) *Ante*, 83.

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MARTINDALE and Others v. MARTINDALE.

MARTINDALE

v.

10	566
127	94

10	566
128	370

10	566
134	187

10	566
139	450

139	65
139	248

10	566
144	498

10	566
151	104

10	566
155	144
155	147

Monday,
October 11.

MARTINDALE. The reenactment of a former section of a statute in a later section, is not necessarily a repeal of the former section.

A. died, leaving a second wife by whom he had no children, and several children by a former wife, surviving him; and being, at the time of his death, seized in fee of a tract of land. *Held*, that, under our law of descents (1 R. S. p. 248), the second wife was entitled to one-third of her deceased husband's real estate for life only, as against his children by the former wife.

APPEAL from *Miami* Court of Common Pleas.

PERKINS, J.—Suit for partition. The complaint is by *Frances Martindale*, who alleges that she is the widow of *Thomas Martindale*, deceased; that said *Thomas*, at the time of his death, was the owner in fee of certain real estate, which she describes, and which is situate in *Miami* county, *Indiana*; that said *Thomas* left surviving him *Jonathan Martindale* and nine others, his heirs at law. She claims one-third of the real estate in fee.

The defendants answered that they are the heirs at law of said *Thomas*, who died in 1856; that the complainant was his second wife, and that said *Thomas* left no children surviving him by the complainant; but that said defendants are all his children by a former wife. They claim, therefore, that the complainant is not entitled to one-third in fee, but only one-third for life, as her dower in said lands.

The complainant demurred to the answer. The demurrer was sustained; and the complainant was adjudged to be entitled to one-third of the lands in fee, and they were set off to her accordingly.

The correctness of the decision must be determined by the law of descents.

Section 18, p. 250 of the 1 R. S. 1852, enacts, that on the death of the husband, a surviving wife shall inherit one-third of his real estate in fee where its value is 10,000 dollars or less; one-fourth, where its value is over 10,000 and does not exceed 20,000 dollars; and one-fifth where its value exceeds 20,000 dollars.

Section 23 provides that if the husband die leaving a widow and but one child, one-half of his real estate, no matter of what value, shall descend to the widow, and the other half to the child. May Term,
1858.
MARTINDALE
v.
MARTINDALE.

Section 24 qualifies both the foregoing sections, by enacting that if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children. This section, in the cases embraced by it, limits the wife to a life estate in the husband's lands; and it embraces the case now under consideration.

But section 27 reenacts section 17, and extends its operation to equitable estates; and it is claimed that it has the effect of repealing sections 23 and 24.

The reenactment of a former section of a statute in a later section, is not necessarily a repeal of the former section. The reenactment may amount to nothing, and thus have no effect by way of repealing any former section. *Cheezem v. The State*, 2 Ind. R. 149.—*Alexander v. The State*, 9 *id.* 337.

Again, these are all sections of one statute and must be so construed as to give them all effect as far as possible, and carry out the intention of the legislature. *Spencer v. The State*, 5 Ind. R. 41.

Previous experience had taught us that some care seems to have been taken by our codifiers to get into the code as many conflicting sections as could well be inserted. This case adds to the evidence. Thus, in the same statute we are considering, section 18 provides that if a second wife shall die, leaving children by a former husband, her real estate coming to her by such former husband, shall go to those children; while section 22 provides, generally, that one-third of the real estate of a deceased wife shall go to her widower. But those sections must be construed together.

In the case at bar, to give the widow a fee instead of a life estate, would work great injustice to the children of her late husband; and it will be well worthy the consider-

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PRESBYTERI-
AN CHURCH
OF PERU.

ation of legislators, whether the steps taken in abolishing dower and substituting a fee, in any case where there are surviving children, ought not to be retraced. Provide well for the widow while living; but put it not in her power to rob, for the benefit of another, the children of her deceased husband.

A careful study of our law of descents will impress all with the necessity of its revision.

Per Curiam.—The judgment is reversed with costs. Cause remanded with instructions to give the complainant a life estate, but not a fee.

D. D. Pratt, N. O. Ross and R. P. Effinger, for the appellants.



BEARD and Wife, Administrators, v. THE FIRST PRESBY-
TERIAN CHURCH OF PERU.

A bill of exceptions, after setting forth what purported to be the evidence of certain witnesses, stated as follows: "Which was all the evidence offered in the case." *Held*, that this was not sufficient under the rule of the Supreme Court.

The affidavit of a witness that he would have testified more in detail upon certain points, if he had been more minutely examined, is not sufficient to sustain an application for a new trial upon the ground of newly discovered evidence, where there is nothing in the record showing that the party was not aware of the facts of which the witness might have testified, and nothing in reference to diligence is shown.

Where the complaint is sufficient to bar another suit for the same cause, and it was not demurred to in the Court below, no question upon its sufficiency can be raised in the Supreme Court.

Monday,
October 11.

APPEAL from *Miami* Court of Common Pleas.

HANNA, J.—This proceeding was commenced by filing, in the form of an account for subscription for the erection of a church edifice, in the office of the clerk of the Common Pleas Court, a claim against the estate of *Driver*. It was entered on the appearance-docket, and *Cole*, the admin-

istrator of *Driver*, allowed it, without making cost or objecting. At the next term of the Court, *Beard* and wife, having become administrators, &c., of the estate of *Driver*, moved the Court to set aside the allowance, which motion was granted, and by agreement, the claim was transferred to the issue-docket, and, without any further pleadings, tried by the Court. Finding for plaintiff the amount of the subscription, 100 dollars. Motion for a new trial overruled. Two exceptions were taken—one to the ruling of the Court on the motion for a new trial, and the other in regard to the judgment for costs.

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v.
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PRESBYTERI-
AN CHURCH
OF PERU.

The sufficiency of the evidence is attempted to be questioned; but we cannot consider that point, for the reason that the bill of exceptions, after setting forth what purports to be the evidence of certain witnesses, states as follows: "Which was all the evidence offered in the case." Other evidence might have been given, which was not offered by either party. This does not comply with the rule (1).

One *Rex* was introduced as a witness, on the trial, in behalf of the defendants. One of the reasons filed for a new trial was newly discovered evidence. The affidavit of this witness was produced upon that point, and shows that he would, if he had been more minutely examined, have testified more in detail in reference to the points upon which he and *Statesman*, a witness for plaintiff, had testified. There is nothing in the record showing that the defendants were not aware of the facts of which he might have testified, nor is anything in reference to diligence shown. The affidavit was insufficient.

It is assigned as error that the complaint is not sufficient. There was no demurrer to it. By agreement the case was tried upon it; and as it is sufficient to bar another suit for the same cause, it is now too late, for the first time, to make the objection to its sufficiency in this Court.

As to the question of costs, we think that the order was right, as no costs had been made by the first administrator, nor, indeed, any, previous to the setting aside the allowance, so far as we are informed by the record.

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1858.

FULTON
v.
CAREY.

Per Curiam.—The judgment is affirmed with costs.
N. O. Ross and *R. P. Effinger*, for the appellants.
J. A. Beal and *J. W. Gordon*, for the appellee.

(1) See *Manly v Hubbard*, 9 Ind. R. 239, and note 2 to that case.

FULTON v. CAREY.

A husband, holding lands in trust for his wife, cannot, after her death, make a valid sale thereof: and a decree against him to enforce an agreement on his part to convey the same is erroneous.

Monday,
October 11.

APPEAL from the *Delaware* Circuit Court.

HANNA, J.—This was an action commenced by *Carey*, assignee of one *Foreacre*, to compel a specific performance of a written contract for the sale of lands.

The facts, as shown by the pleadings, appear to be that one *Drum*, who was the father of the wife of *Fulton*, during his lifetime, by parol, divided his lands among his eight children; and by that division two certain forty-acre tracts in *Delaware* county were set apart to Mrs. *Fulton*. He died before he had executed deeds. His children were in possession of their respective portions, as allotted to them by him, and had made improvements thereon. After his death his heirs, other than the wife of said *Fulton*, without any other consideration, joined in a quitclaim deed to *Fulton* and wife, in which they attempted to release any interest they had in said forty-acre tracts of land, but therein misdescribed one of the forty-acre tracts. The deed was made without the knowledge of *Fulton* and wife, but was afterwards accepted by them for her use, as is alleged in the answer, and so far as defendant is concerned, to be held in trust for her. The wife of *Fulton* died in 1849, leaving children, and afterwards he executed the title-bond upon which suit is brought.

These facts are shown by the answer, to which a demurrer was sustained.

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1858.

The principal question is, whether, under this state of facts, *Fulton* had the power to sell and convey said lands. Upon sustaining the demurrer to the answer, the Court decreed a specific performance in such manner, and on such terms, as shows it was upon the supposition that *Fulton* and his wife received as joint tenants, and he held as her survivor.

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V.
CAREY.

It is reasonable to presume that the division made by the elder *Drum* in his lifetime, was, by his children, regarded as fair and equitable, or they would not have attempted to sustain it by making deeds, &c.

If it was equitable, we think that, after the death of the ancestor, *Fulton* and wife might have maintained such proceedings, as might have been necessary, against the other heirs, to have perfected their title, if those others had refused to convey. If this was the equitable right of Mrs. *Fulton* at the time they accepted the deed from the other heirs, the question is, whether such acceptance could be, as alleged, made for her use; and whether it operated as anything more than a written confirmation, by the heirs, of the parol partition made by the ancestor in his lifetime. We think that such is the light in which it should be viewed. That the gift to Mrs. *Fulton*—possession taken—improvements made—added to the presumed equitable distribution made by *William Drum*—were sufficient to entitle her to have maintained her action to complete the title; and that the deed made by the other heirs merely avoided the necessity of such action, and confirmed her in her right. The demurrer admits that so far as the name of the defendant occurs in the deed, he held in trust for her. The decree declaring that the title was vested in *Fulton* at the death of his wife, &c., is wrong.

Per Curiam.—The judgment is reversed with costs.

W. March, for the appellant.

T. J. Sample, for the appellee.

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1858.

O'DAILY
v.
THE STATE.

O'DAILY v. THE STATE, Two Cases.

From the *Tippecanoe* Common Pleas.

DAUPHIN v. THE STATE, Two Cases.

From the *Tippecanoe* Common Pleas.

SHANK v. THE STATE.

From the *Lagrange* Common Pleas.

GRIFFIN v. THE STATE.

From the *Tippecanoe* Common Pleas.

DELL v. THE STATE.

From the *Tippecanoe* Common Pleas.

REDIN v. THE STATE.

From the *Tippecanoe* Common Pleas.

HEMBERGER v. THE STATE.

From the *Jennings* Common Pleas.

Per Curiam.—These were all prosecutions under the liquor law of 1855. The defendants below were fined. The judgments in all the cases are reversed for the reason given in the case of *O'Daily v. The State*, 9 Ind. R. 494.

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1858.

DOWELL and Another v. RICHARDSON.

DOWELL
v.

A motion to dismiss a suit brought by a non-resident for want of a bond for security of costs, should be overruled upon the filing of a sufficient bond by the plaintiff.

In an action before a justice of the peace, for the recovery of personal property, the complaint must allege, that the property sought to be recovered, has not been taken by virtue of an execution, or other writ, &c.; must be verified by affirmation, or affidavit; and a bond must be filed before the writ issues; otherwise the Court has no jurisdiction of the cause.

A verdict in favor of the plaintiff, in replevin, is bad for uncertainty, if the Court cannot determine from it what property the jury intended to find belonged to him.

APPEAL from the *Rush* Court of Common Pleas.Monday,
October 11.

HANNA, J.—This was an action commenced by the appellee against the appellants, before a justice of the peace, to recover possession of four hogs. Objection, in the form of a demurrer, was taken, to the sufficiency of the complaint before the justice. Trial and judgment for plaintiff for a part of the property. Appeal to the Common Pleas Court. Motion by the defendants to dismiss for failure by the plaintiff to file with the justice security for costs—said plaintiff being a non-resident; whereupon, on motion of plaintiff, he had leave to, and did, file a bond for costs, and thereupon the motion to dismiss was overruled; which ruling is assigned as error:

The defendants then, the record states, “renewed their motion, which was made by demurrer before the justice of the peace, for the dismissal of said cause because said complaint and affidavit did not contain facts sufficient to constitute a cause of action. Motion overruled. Trial by a jury, and verdict as follows: “We the jury find that two (2) of the four hogs replevied were the property of the plaintiff, and that their value was proved to be 19 dollars; and that two (2) of the hogs replevied were the property of the defendant, and their value, as proved, was 18 dollars. We further find for the plaintiff and assess his damages at one cent.” A motion to set aside the verdict and grant a new

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trial was overruled; and also a motion in arrest of judgment.

The evidence is not in the record. The refusal of the Court to give certain instructions asked by defendants, is excepted to and assigned as error. The judgment is as follows:

“It is therefore considered by the Court that the plaintiff do recover the spotted sow and sandy barrow, valued at 19 dollars; and that the other two hogs, valued at 18 dollars, not proven, be returned to said defendants, and that the said plaintiff also recover the sum of one cent, his damages, together with costs,” &c.

The appellants insist that the complaint is insufficient, the verdict too uncertain, and the judgment unauthorized.

Upon the bond for costs being filed, the motion to dismiss for want of security for costs was properly overruled. *Lemon v. Temple et al.*, 7 Ind. R. 556.—2 R. S. p. 127.

As to the question of the sufficiency of the complaint, it does not contain an allegation that the property had not been taken by virtue of any execution or other writ, &c., nor is it verified by affidavit. And the appellants therefore insist that the ruling of the Court was erroneous upon that point. No bond was filed, and it is argued that until one was filed the Court had no jurisdiction to issue a writ, &c.

The statute (2 R. S. p. 464, § 71) regulating proceedings in such cases before a justice, appears to require that the complaint should contain such averment, and be verified by affidavit, and that a bond should be filed. It is in some respects different from that regulating such proceedings in the Circuit Court, &c. *Id.* p. 54. There was a somewhat analogous difference in the mode of proceeding, in the two Courts, provided for in the statute of 1843, pp. 698, 896, which was recognized and sustained by this Court in the case of *Bringhurst v. Pollard et al.*, 6 Ind. R. 452. Following that case, the objection was well taken, and should have been sustained.

The verdict is too uncertain. The evidence not being in the record, it is impossible to determine which of the

four hogs the jury intended to find belonged to the plaintiff. Nor do we decide that if the evidence was in the record, the Court could look to it to determine the application of the verdict. That question is not before us.

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DOWELL
V.
RICHARDSON.

If the judgment had followed the verdict it could not have been executed because of its vagueness and uncertainty. The Court, in applying the verdict to the two animals designated in the judgment, may or may not have met the intention of the jury.

Per Curiam.—The judgment is reversed with costs.

A. W. Hubbard and L. Sexton, for the appellants.

END OF MAY TERM, 1858.

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TO THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

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ABANDONMENT.

See **CONTRACT**, 5, 6; **DIVORCE**; **EVIDENCE**, 10; **PLEADING**, 22; **RAILROAD COMPANY**, 4.

ACCEPTANCE.

See **BILLS OF EXCHANGE**; **ORDERS**, 1, 2.
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See **CORPORATIONS**, 4.

ACCOMPLICE.

See **WITNESS**, 1, 2.

ACCOUNT.

See **EVIDENCE**, 13; **LIMITATIONS**, 4, 5; **MISTAKE**.

ACTION.

1. Suit upon a lease, assignment and guaranty. The lessee agreed to make certain improvements on the premises. The lessor assigned the lease or agreement to the appellee, and guarantied that the lessee would perform his part of the contract within 10 dollars' worth of work. The assignee sued the lessor.

Held, first, that the lease, assignment and guaranty were a sufficient cause of action.

Second, that it was not necessary that the consideration for the guaranty should be set out.—*Harper v. Pound*, 32.

2. Action against a sheriff and his sureties, on his official bond. Breach, failure to deliver an execution to his successor, or to return it, &c. The action accrued under the statute of 1849, but was brought under that of 1852. *Held*, that the amount of the recovery was governed by the statute of 1852; and that the defendants might give evidence of the insolvency of the execution-defendant, for the purpose of showing the amount that the sheriff might probably have collected.—*Collier et al. v. The State ex rel. Lewis*, 58.

3. In cases where, under the former practice, general assumpsit might be brought where there had been a special contract, an action may now be brought upon the implied legal engagement or obligation of the defendant to pay for the services or thing ordered or received by him, without reference to the special contract.—*Kerstetter v. Raymond*, 199.

4. If the defendant, in such case, would avail himself of the special contract, either to defeat the action or to fix the measure of damages, he must plead it, and produce it in evidence.—*Ibid.*
 5. But if, in such a proceeding, the existence of a special contract is developed by the evidence, the plaintiff must show its stipulations, and that he has complied with them on his part, or that he has been prevented from doing so; and he must make it appear that he is in a condition to recover without regard to it.—*Ibid.*
 6. Where there is a good complaint, the name of the action is immaterial. An objection to a matter of form, is waived by proceeding in a cause without raising the objection.—*Patterson et al. v. The State*, 296.
 7. *A.* and *B.*, as partners, were indebted to *C.* by note. *A.* sold his interest in the partnership to *D.* *D.* and *B.* agreed to pay all the debts of *A.* and *B.* Afterwards, *D.* sold his interest to *B.* Afterwards, *A.* gave his individual promissory note to *C.* for an unpaid balance of the partnership debt, *B.* agreeing to assign to him promissory notes for the amount. *C.* thereupon surrendered the partnership note. *A.* brought suit against *B.* on the promise. There was evidence tending to prove a demand by *A.* before suit. *Held*, that *A.* was entitled to recover.—*Warbritton v. Cameron*, 302.
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An affidavit of the non-residency of a party is not bad for not stating the cause of action, or for containing the qualifying words "as the deponent verily believes."—*Trew et al. v. Gar-kill*, 265.

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AGREEMENT.

See *Stephenson v. Cornell*, 475.

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AMENDMENT.

1. Judgment by default may be taken against a defendant properly served with process; and where an entry of default was not made, it is amendable in the Court below, and on appeal, the amendment will be presumed to have been made.—*Shaw et al. v. Binkard*, 227.
2. A motion for leave to amend after the evidence has been heard is addressed to the discretion of the Court, and where neither the evidence nor the proposed amendment are in the record, this Court cannot say that the Court below has abused its discretion.—*Ibid.*
3. Where the sum demanded in the conclusion of a complaint in the Common Pleas exceeds the jurisdiction, the Court may permit an amendment reducing the claim to an amount within the jurisdiction.—*Brown et ux. v. Lewis*, 232.
4. In a suit in the Common Pleas, the plaintiff laid his damages, in the conclusion of his declaration, at 1,000 dollars. The Court permitted him to amend by reducing his claim to 999 dollars. *Held*, that the amendment was proper.—*Harvey v. Ferguson*, 393.

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ANSWER.

See PLEADING, 1, 5, 6 to 9, 14, 15, 16, 20, 23, 27; SET-OFF.

APPEAL.

1. If, on appeal to the Supreme Court, positions taken against the judgment below are not argued or supported by authority, they may be considered as waived.—*Mumford et al. v. Thomas*, 167.
2. Proceeding to obtain the partition of real estate. The Court found the respective shares of the parties. The defendant moved for a new trial. Motion overruled, and exception taken. Appeal prayed and refused. Commissioners appointed to make partition. Appeal then granted. *Held*, that there was no appeal until the report of the commissioners was returned, and the proceeding finally disposed of by that Court: otherwise, there might be another appeal from an order of the Court subsequently made that the land should be sold, if the report authorized such order, and then from the final order.—*Griffin v. Griffin*, 170.
3. In this case the clerk's certificate states that the transcript contains so much of the proceedings in the Court below, as the defendant's attorney directed him to give. *Held*, that an appeal will not be entertained upon a transcript thus certified, except in a case authorized by statute.—*Vanliaw v. The State ex rel. Ackerman*, 384.

See AMENDMENT, 1; BILL OF EXCEPTIONS; COUNTY COMMISSIONERS, BOARD OF, 2; CRIMINAL LAW, 4, 5; JUDGMENT, CONFESSION OF; JURISDICTION, 6; SETTLEMENT OF DECEDENT'S ESTATES, 2, 3.

APPEAL-BOND.

See PRACTICE, 9.

APPEARANCE.

The filing of a demurrer amounts to a full appearance.—*Kegg et al. v. Welden*, 550.

See NE EXEAT, 3, 4; PLEADINGS, 16; PRACTICE, 18; SUMMONS, 2.

APPEARANCE-DOCKET.

See EXECUTORS AND ADMINISTRATORS, 3.

APPRAISEMENT.

See SHERIFF'S SALE, 1 to 4.

APPRAISEMENT LAWS,

See MORTGAGE, 10.

APPRAISER.

See EXECUTION, 3.

ARGUMENT.

1. The party upon whom the burden of the issue rests, is entitled to open and close the argument.—*Gaul et ux. v. Fleming*, 253.
2. Suit upon a note. Answer, setting up particular facts tending to show a failure of consideration. Reply, avoiding some of those facts by new matter, and denying the existence of others. The Court gave the opening and close upon the trial to the plaintiff. *Held*, that this was right: the new matter in avoidance of the answer gave the plaintiff the affirmative.—*French v. Howard*, 339.

See APPEAL, 1; JURY, 8,

ARRAIGNMENT AND PLEA.

See CRIMINAL LAW, 4, 5, 7.

ASSESSMENT OF DAMAGES,

For Land Taken.] See RAILROAD COMPANY, 11, 29, 30, 32.

ASSIGNMENT.

See ACTION, 1.

Of Error.] See *Dronberger v. Murphy*, 552; ERROR.

Of Judgment.] See JUDGMENT, 2.

ASSUMPSIT.

See ACTION, 3.

ATTACHMENT.

Where in a proceeding in attachment against real estate, there was no description of the property, in either the sheriff's return or the judgment:—

Held, first, that the proceedings were void for uncertainty.

Second, that they cannot be explained by extrinsic evidence.—*Porter v. Byrne et al.*, 146.

See EXECUTION, 5.

ATTORNEY.

An attorney in fact cannot set up, in defense of a suit against him, transactions unauthorized by his power, and not within the scope of his employment.—*Earnhart v. Robertson*, 8.

At Law.] See JUDGMENT, 3.

AUDITOR OF STATE.

1. A bank cannot sue the auditor of state and his sureties, upon his official bond, to recover stocks deposited with him as security for the redemption of its issues, &c., nor for their

value, without showing that the object for which they were deposited is accomplished.—*The State ex rel. Griswold v. Dunn*, 269.

2. Thus, the stocks are for the benefit of the creditors of the bank, and if the officer with whom they are deposited converts them to his own use, or diverts them from the purpose for which they were deposited, the remedy upon his bond is for the benefit of such creditors; and the bank cannot sue for the stocks, or for damages upon the bond, until it has no creditors.—*Ibid*.
3. But the successor of such delinquent officer, being charged with the duty of his predecessor, may sue to recover the means wherewith to discharge that duty.—*Ibid*.

B.

BAIL.

When Sheriff may accept.] See RECOGNIZANCE, 2.

BAILMENT.

1. Suit to recover the value of a quantity of corn stored with warehousemen. The receipt given for the corn was as follows: "*Portland, February 16, 1856. Received in store from Barnard Pribble by same for same, not transferable without notice, and not accountable for loss by fire, 132 bushels 43 lbs. corn, in store till 1st May, at 2 cents. Kent & Hitchens.*" Held, that the receipt shows a contract by which the specific article deposited was to be re-delivered.—*Pribble v. Kent et al.*, 325.
2. In this species of bailment, the property remains in the bailor, and the bailee holds a lien upon it for the storage.—*Ibid*.
3. On the first of *May*, in this case, the bailor had a right to demand and recover the corn, on paying the charges for storage.—*Ibid*.
4. The bailor failing to make such demand, the bailee may, at the end of one year, under our statute, sell the deposit, after notice, at public auction.—*Ibid*.
5. But here, the bailor's complaint shows that he demanded the corn and tendered the amount due for storage, on the 18th of *September* following—the bailees not having yet disposed of it by any legal mode. Held, that the bailees should have redelivered the deposit, and having failed to do so, an action against them for its value was well brought.—*Ibid*.
6. The suit was in the nature of an action of trover; the demand and refusal would be evidence of conversion; and the value of the property at that time would, it seems, be the measure of damages.—*Ibid*.

BANKS AND BANKING.

1. The term *bank* does not necessarily refer to a chartered banking institution; though it includes all such, and is used in our constitution simply in reference to that class of banks.—*Davis v. McAlpine*, 137.
2. Charters are not requisite for banks of deposit and discount.—*Ibid*.
3. The legislature, by § 6, ch. 77, 1 R. S. 378, intended to place private and chartered banks of deposit and discount upon the same footing.—*Ibid*.
4. A. sent money to a bank in the form of a draft, with directions to place it to his credit and await his further orders. The banking firm gave a receipt for the same. Afterwards A. agreed with B. that the draft should be transferred to B.'s credit; but the firm was not privy to the agreement, nor did A. notify them of it, or make any order in pursuance of it. B., however, without authority from A., wrote to the firm ordering them to place the draft to his credit, and was answered that they had done so. Afterwards, A. demanded the money,

and the firm refusing to pay it, he brought suit. *Held*, that the firm was liable to A. for the amount of the draft.—*Coffin et al. v. Henshaw*, 277.

See AUDITOR OF STATE, 1, 2; PROMISSORY NOTES, 2.

BARON AND FEME.

See HUSBAND AND WIFE.

BESTIALITY.

See SLANDER, 2.

BET.

See WAGER.

BIDDER.

See REPRESENTATIONS, 1; SHERIFF'S SALE, 2, 5.

BILL OF EXCEPTIONS.

1. This Court will not examine a question upon the sufficiency of evidence, where the bill of exceptions purports to contain only "the substance of all the evidence introduced."—*McCole et al. v. The State ex rel. Chipman*, 50.
2. Where no exception was noted at the time a decision was made, but the bill of exceptions, filed two days after judgment, states in the present tense, that the party excepts,—*held*, that the exception was taken too late.—*Johnson v. Bell*, 363.
3. Where a bill of exceptions taken and filed after the decision objected to was made, states that the party excepted to the decision at the time it was made, it will be presumed that time was given to reduce the exception to writing, from the fact that the Court afterwards permitted it to be filed; but where neither the bill nor the record shows the exception to have been taken at the time the decision was made, it cannot be presumed that it was so taken, from the fact that the Court permitted the bill of exceptions to be afterwards filed.—*Ibid*.
4. The record shows that this cause was tried on the 23d of *February*, 1853; and on that day a bill of exceptions was taken and filed. The bill, after stating the names of the parties, &c., proceeds—"The following evidence being before the jury, viz., three sets of depositions, the Court charged the jury as follows: (here insert the charge in the handwriting of the judge). To which the plaintiff objected. The Court overruled the objection, to which ruling the plaintiff excepted. And also, on said trial the plaintiff requested the Court to give the following charge: (here insert in the handwriting of *Jacoby*). Which the Court refused to do, and the plaintiff excepted to said last ruling," &c. The clerk, in making a transcript of the record for this Court, inserted what purported to be depositions given in evidence on the trial; also instructions given, and an instruction refused by the Court. *Held*, that these alleged rulings were not properly before the Court; because, under the rules of practice, as they stood when these exceptions were taken, the clerk had no right to make such insertions in a bill of exceptions, unless authorized to do so by agreement of the parties entered upon the record; that the depositions, charges given, and charge refused should have been copied into the bill at the time it was signed by the judge.—*Mills v. Simmonds*, 464.
5. Prosecution for assault and battery. Conviction, &c. In the record there was what purported to be a bill of exceptions, wherein it was stated that the defendant moved in arrest of judgment, but his motion was overruled. The bill, however, did not appear to have

been signed by the judge and filed by the clerk. *Held*, that its statements, as to the rulings of the Common Pleas, were not properly before the Court.—*Patterson v. The State*, 551.

6. A bill of exceptions filed at a term subsequent to that at which the alleged errors were committed, and not showing that time was then given to prepare it, is too late to avail the party taking it upon appeal.—*Lawton v. Swihart*, 562.

7. A bill of exceptions, after setting forth what purported to be the evidence of certain witnesses, stated as follows: "Which was all the evidence offered in the case." *Held*, that this was not sufficient under the rule of the Supreme Court.—*Beard et ux. v. The First Presbyterian Church, &c.*, 568.

See COSTS, 2; DEPOSITIONS, 9; RAILROAD COMPANY, 30; *Orr v. Worden*, 553; *Osborne v. Osborne*, 420; *Templeton et al. v. Hunter*, 380.

BILLS OF EXCHANGE.

1. If the acceptor of a bill of exchange fail to pay, and the bill be returned to the drawer, the latter may sue the former for non-payment.—*Pilkington v. Woods*, 432.

2. The acceptance of a bill raises the presumption that the acceptor has funds of the drawer in his hands; and where a drawer makes a bill payable to a third person, it is an acknowledgment that he owes that person.—*Ibid*.

3. Upon the failure of an acceptor to pay, if the bill be found in the hands of the drawer with the blank indorsement of the payee upon it, the presumption is that he has discharged his debt to the payee, and that he is entitled to enforce the acceptance of the drawee.—*Ibid*.

4. In an action founded upon the return of a bill for non-payment by the acceptor, if the bill be shown to have been once in circulation, it will be presumed that it came back into the plaintiff's hands by payment, in the regular course by which dishonored paper goes back to the original parties, and that he holds the same in good faith; and he may recover though there be one or more indorsements in full upon it, subsequent to the one to him, and he may strike out such indorsements.—*Ibid*.

5. The indorsement of the payee is presumptive evidence that a bill has been in circulation. *Ibid*.

See ORDERS.

BILL OF PARTICULARS.

See PLEADING, 21; SET-OFF, 1.

BLANK INDORSEMENT.

See PROMISSORY NOTES, 4.

BOARD OF COUNTY COMMISSIONERS.

See COUNTY COMMISSIONERS, BOARD OF.

BOND.

See COSTS, 5; ESCROW; NE EXEAT, 1; REPLEVIN, 1.

For Deed.]

See PLEADING, 16.

Arbitration-Bond.]

See RECOURSEMENT.

BOOKS.

Of Accounts.]

See MISTAKE.

BRIDGE.

See *The Board of Trustees, &c., v. Mayer*, 400.

BRIEFS.

In a case which had been on file since 1849, and in which no brief had been filed, the Court presumed that the errors, if any, were waived, under the rule.—*Henderson v. Burch*, 54.

See ERROR, 3; *Shaw et al. v. Binkard*, on p. 231; *Zehnor v. Crull*, 547.

BUILDING MATERIALS.

See OBSTRUCTION OF GUTTER.

C.

CASES OVERRULED, EXPLAINED, DOUBTED, DENIED, &c.

CARTER v. THE STATE, 2 Ind. R. 617, explained. *Williams v. The State*, 503. See JURY, 6, 7.

COMAN ET AL. v. THE STATE, 4 Blackf. 241, overruled. *Carpenter v. Dame et al.*, 125. See EVIDENCE, 3.

DRISKILL v. THE STATE, 7 Ind. R. 338, explained. *Williams v. The State*, 503. See JURY, 6, 7.

LEMASTERS ET AL. v. THE STATE, 391 of this volume, compare with *Lawrence v. The State*, 453.

PERU, &c., RAILROAD COMPANY v. BRADSHAW, 6 Ind. R. 146, adhered to. *The Indianapolis, &c., Railroad Co. v. Davis*, 398.

RICE v. THE STATE, 7 Ind. R. 332, explained. *Williams v. The State*, 503. See JURY, 6, 7.

SNYDER v. DEGANT, 4 Ind. R. 578, overruled. *Ausman et ux. v. Veal*, 355. See SLANDER, 2, 3.

STOCKING v. THE STATE, 7 Ind. R. 326, explained. *Williams v. The State*, 503. See JURY, 6, 7.

STOUT v. WOOD, 1 Blackf. 71, doubted. *Blystone v. Burgett*, 28. See MORTGAGE, 3.

TITUS v. SCANTLING, 4 Blackf. 89, doubted. *Blystone v. Burgett*, 28. See MORTGAGE, 3.

WRIGHT v. DELAFIELD, 23 Barb. 498, doubted. *Blystone v. Burgett*, 28. See MORTGAGE, 3.

CATTLE, DESTRUCTION OR INJURY OF.

See JUDGMENT, 4; RAILROAD COMPANY, 1 to 4, 12 to 16.

CAUSES OF DEMURRER.

See PLEADING, 11, 17, 18, 25, 26.

CAUSES PENDING.

See CONTINUANCE, 4.

CERTIFICATE.

See DEPOSITION, 10.

Of Transcript.]
From Supreme Court.]
Of Stock.]

See APPEAL, 3.
 See PRACTICE, 9.
 See RAILROAD COMPANY, 22.

CHANCERY.

1. A cause in chancery, brought to issue, hearing and decree upon the merits, under the former practice, will not, upon a reversal of the decree by this Court, be opened for new pleadings or a new trial. Such causes are finally disposed of on the hearing in the Supreme Court.—*Leach v. Leach*, 271.
2. On appeal to the Supreme Court in a chancery suit commenced and determined under the old practice, the Court presumes that all the evidence offered is before it, except the proof of such deeds, records, &c., as might be proven orally at the bar.—*Wells et al. v. Sprague*, 305.
3. And the Court examines the cause upon the law and the facts, and decides it upon its merits.—*Ibid.*

See NEW TRIAL, 4; PLEADING, 3, 4, 5.

CHANGE OF NAME.

See CORPORATIONS, 16.

CHANGE OF VENUE.

See VENUE.

CHARGE TO THE JURY.

See CRIMINAL LAW, 8; JURY, 7, 8; *Williams v. The State*, 503.

CHATTEL MORTGAGE.

See MORTGAGE, 1 to 5.

CHURCHES.

Schemes in aid of.]

See LOTTERY, 2, 3.

CIRCUIT COURT.

See JURISDICTION, 8, 9, 10.

CITATION.

See EXECUTORS AND ADMINISTRATORS, 5.

CITIES.

See SCHOOLS.

CLAIMS AGAINST DECEDENTS' ESTATES.

See EXECUTORS AND ADMINISTRATORS, 2, 3, 4.

"CLEARING LAND."

Meaning of the Words.]

See CUSTOM, 4.

CLERK OF THE CIRCUIT COURT.

See PRACTICE, 9.

INDEX.

COLLOQUITUM.

See SLANDER, 2.

COMMERCIAL USAGES.

See CUSTOM, 2, 3.

COMMON LAW.

Presumption of its Existence in Foreign State.] See MORTGAGE, 3.

COMMON PLEAS, COURT OF.

1. The act of 1852 establishing Courts of Common Pleas graduates the salaries of the judges, partly upon population, partly upon territory, and partly upon population and territory combined. *Held*, that the act is not uniform, within the meaning of the constitution.—*Cowdin v. Huff*, 83; *Lamb v. Rawles*, 565.
2. The provisoes in § 38 of that act are void.—*Ibid*.

Jurisdiction of.] See AMENDMENT, 3, 4; JURISDICTION, 1, 2, 3, 6, 7; RAILROAD COMPANY, 15; RECOGNIZANCE, 1; SETTLEMENT OF DECEDENTS' ESTATES, 1, 2.

COMPETENCY.

See WITNESS.

COMPLAINT.

See PLEADING, 17, 18, 19, 22, 30; PROMISSORY NOTES, 13; RECOGNIZANCE, 4; REPLEVIN, 1.

COMPOSITION WITH CREDITORS.

See DEBTOR AND CREDITOR.

CONCEALMENT.

Of Cause of Action.] See LIMITATIONS, 1.

CONDITIONAL SUBSCRIPTION.

See CORPORATIONS, 11, 12, 13, 15; EVIDENCE, 15; RAILROAD COMPANY, 18 to 22; SUBSCRIPTION OF STOCK.

CONDITION SUBSEQUENT.

See COVENANT, 4, 5.

CONFESSIONS.

See CRIMINAL LAW, 3.

CONFLICT OF LAWS.

See MORTGAGE, 1 to 5.

CONSEQUENTIAL INJURY.

See RAILROAD COMPANY, 6, 7.

CONSIDERATION.

See CONTRACT, 10; CORPORATIONS, 11; FRAUDS, STATUTE OF, 2; PROMISSORY NOTES, 8, 9; SPECIFIC PERFORMANCE.

CONSOLIDATION.

Of Railroad Companies.]

See CORPORATIONS, 6, 7, 8.

CONSTABLE.

See EXECUTION, 1; INDICTMENT, 6.

CONSTITUTIONAL LAW.

See BANKS AND BANKING, 1; COMMON PLEAS, COURT OF; CORPORATIONS, 5; JURY, 7, 8; OFFICE, 6, 7; SCHOOLS; TAXES, 1.

CONTINUANCE.

1. A continuance to obtain testimony is rightly refused where the fact sought to be proved is unimportant.—*Bird v. McElvaine*, 40.
2. Where a demurrer to a pleading has been sustained, the refusal of a continuance to enable the party filing it to obtain answers to interrogatories framed to elicit evidence to sustain his pleading, is not error.—*Swift et al. v. Ellsworth*, 205.
3. Where an affidavit for a continuance to obtain testimony alleged due diligence, but it appeared that the witnesses had been subpoenaed on *Saturday* during term, and that the trial was had on the following *Tuesday*; and where the affidavit did not allege a probability of obtaining the testimony by the next term:—*Held*, that the refusal of a continuance was not error.—*Deming v. Patterson*, 251.
4. Causes pending at the close of a term of the Common Pleas, are continued by operation of law. No order of continuance is necessary.—*Trew et al. v. Gaskill*, 265.

See COSTS, 3; DEPOSITIONS, 3; NE EXEAT, 3.

CONTINUING COVENANT.

See COVENANT, 1 to 5.

CONTRACT.

1. A party may rescind a contract entered into when he was so far intoxicated as to render him incompetent to contract, within a reasonable time.—*Cummings v. Henry*, 109.
2. Whether the party was so intoxicated, is a question for the jury.—*Ibid*.
3. A contract of sale of property intended to be used for gaming, is not void under our statutes.—*Ibid*.
4. *A.* purchased of *B.*, by a verbal contract, a parcel of land, paid part of the purchase-money, took possession, and made improvements; but afterwards they agreed to rescind the contract, *A.* agreeing to surrender the possession and improvements about the first of *March*, and *B.* agreeing to give *A.* a horse worth 110 dollars, and certain notes. The horse was delivered and accepted. On the 28th day of *February*, *A.* tendered the possession, &c., and removed from the premises. *B.* refused to execute the notes. *A.* brought suit. *Held*, first, that the contract was not void for uncertainty. Second, that it was not void by the statute of frauds.—*Sutton v. Sears*, 223.
5. Where a party abandons his contract, the opposite party has his election to sue or make a new agreement; and if in such new agreement he make new or additional promises, dependent upon the performance of the work contracted for, and the party abandoning the original contract, in consideration of such new promises complete the work, the promises are binding.—*Coyner v. Lynde et al.*, 282.
6. Such new agreement may by its terms, or by legitimate implication, dispose of any right of action arising under the previous contract.—*Ibid*.

7. As a general rule, a receipt is not a contract, and parol evidence may be admitted touching its subject-matter, while a written contract, as a general rule, precludes such evidence; but a receipt may be so drawn as to constitute a contract, and a contract may be interpreted or construed by viewing it in the light of established custom.—*Pribble v. Kent et al.*, 325.
8. A receipt is not usually a contract, though it may be so drawn as to constitute one. A receipt not purporting to contain a contract, but merely acknowledging a contract to have been made and a sum paid thereon, is not itself a contract, nor does it preclude parol proof of the contract referred to.—*Sherry et al. v. Picken*, 375.
9. The fact that a man believes his wife to be bewitched, does not show him to be incompetent to make a contract.—*Johnson v. Johnson*, 387.
10. The fact that the consideration of a contract is not, in the judgment of third parties, adequate, does not render the contract void.—*Ibid.*
11. These are circumstances to be considered by the jury.—*Ibid.*

See ACTION, 3, 4, 5; EVIDENCE, 1; PLEADING, 27; RECOUPMENT; SCHOOL HOUSES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER, 3.

CONVEYANCE.

1. Where a sale of real estate precedes the execution of the deed by some time, a verbal reservation or stipulation in reference to anything that would legally pass by the deed without such reservation, &c., will be presumed to be merged in the deed; and where the deed is executed at the time of the sale, such a reservation, &c., will be considered in the light of an exception or defeasance, and being repugnant to the legal effect of the deed, will be held void.—*Chapman v. Long*, 465.
2. A conveyance of the freehold passes emblements, where nothing is said on the subject.—*Ibid.*

See DEED; HUSBAND AND WIFE, 1, 3 to 6, 8, 9; SPECIFIC PERFORMANCE; VACATION OF JUDGMENT.

CORPORATIONS.

1. The first section of the charter of the *Greensburgh and Brookville Plankroad Company* declares the directors named, a corporation *ab initio*. The requirement touching the organization of the company was merely directory. Hence, a subscription to the capital-stock before such organization, was valid.—*Stoops v. The Greensburgh, &c., Plankroad Co.*, 47.
2. And the subscriber was estopped to deny the existence of the corporation, in the absence of fraud.—*Ibid.*
3. A corporation having become, by virtue of its charter, a legal entity, the failure to perform any act prescribed in the charter would not terminate its existence. That can be done only by a direct proceeding.—*Ibid.*
4. It seems that a charter where acceptance may be necessary, may be inferred to have been accepted; and that if the citizens act under it, their action may be regarded as an acceptance.—*The City of Lafayette et al. v. Jenners*, 70.
5. The general law of 1857 for the incorporation of cities is not unconstitutional for want of uniformity in the mode of organization, arising out of the diversity of the municipal corporations that might desire or be compelled to avail themselves of its provisions; nor are the organizations under it void for that reason.—*Ibid.*
6. Where two or more railroad companies, with the consent of the legislature, granted subsequently to the subscriptions of stock, but without the consent of the stockholders, consolidate their separate existences into one, non-consenting stockholders are released, and may withdraw from the corporation.—*Booe v. The Junction Railroad Co.*, 93.

7. *It seems, that such consolidation does not necessarily dissolve the corporation.—Ibid.*
 8. Where the original charter of a railroad company, in such a case, provided that the legislature might make such amendments to the charter as the company might at any time desire,—*held*, that the amendments contemplated were such as might facilitate the construction of the road provided for in the charter, and not such as would, in effect, create a new company, for a different purpose. The word *company*, as there used, probably means the stockholders.—*Ibid.*
 9. A person is estopped to deny the existence of a corporation, at the time he contracted with it as such.—*Ensey v. The Cleveland, &c., Railroad Co.*, 178.
 10. If he deny its existence at a subsequent time, he must show how it ceased to exist.—*Ibid.*
 11. A stipulation in an agreement to subscribe for shares in the capital stock of a corporation to the effect that the installments, when collected, are to be applied in a certain way, constitutes no condition to their payment. The stock itself, is the only consideration of the agreement, and the subscription is absolute.—*The New Albany, &c., Railroad Co. v. Fields*, 187; *The Same v. Slaughter*, 218.
 12. In a suit upon such an agreement, an answer setting up a contemporaneous verbal agreement varying its terms, is bad on demurrer.—*Ibid.*
 13. Though a conditional subscription may be admitted, yet private arrangements, not expressed in the subscription, between an agent of a company and a subscriber, by which he is to have peculiar privileges not extended to other subscribers, or by which his subscription is not to be collected,—being made to induce others to subscribe,—are regarded as fraudulent on other subscribers, and are no defense to a suit for the amount subscribed.—*Ibid.*
 14. A person demanding the right to subscribe to the capital-stock of a corporation is not relieved from the necessity of making a tender, by the statement by the secretary of the company that he has no stock for him.—*Ohio Insurance Co. v. Nunemacher*, 234.
 15. A person subscribing to the capital-stock of a corporation conditionally, is not to be considered a stockholder, or as liable on the subscription, until the company has performed the condition upon which his undertaking depends. When that is done, he becomes a stockholder by force of the agreement of the parties, and the subscription becomes absolute.—*The Evansville, &c., Railroad Co. v. Shearer*, 244.
 16. If the legislature change the name of a corporation without altering its powers or identity, it does not affect a controversy between the company and third parties.—*Rosenthal v. The Madison, &c., Plankroad Co.* 358.
 17. Representations made by a person who is not the authorized agent of a corporation, in soliciting stock for it, though false, are not fraudulent so far as the corporation is concerned.—*The Fort Wayne, &c., Turnpike Co. v. Deam*, 563.
 18. If a person contract with a company as a corporation, he is estopped from denying its corporate existence at the date of his contract.—*Ibid.*
 19. A party may in such case show that such corporation has ceased to exist since he contracted with it; but, in that case, he must, in his answer, specify how it ceased to exist.—*Ibid.*
- See BANKS AND BANKING, 1, 2, 3; EVIDENCE, 5, 6; PLANKROAD COMPANY; RAILROAD COMPANY; SUBSCRIPTION OF STOCK.

COSTS.

1. The reversal of a judgment carries costs in favor of the appellant, back to the point of error upon which the reversal was made; and if it extend back to the issue of fact tried, the costs of the trial are carried by the reversal.—*Conner v. Winton*, 25.
2. The application of this rule is for the Court below, and this Court cannot judge of the

correctness of that application, unless the items taxed to each party are shown in the bill of exceptions.—*Ibid.*

3. Suit commenced before a justice of the peace. Judgment for the plaintiff. Appeal to the Common Pleas. Judgment there for the defendant. The controversy in the Supreme Court was upon the taxation of costs in the Common Pleas. The plaintiff was not satisfied with it. *Held*, that as he lost his case, he was bound, nothing appearing to show to the contrary, to pay all the costs in the Common Pleas and before the justice; but it appearing that the defendant obtained one continuance in the Common Pleas, which the Court granted at his cost, the defendant was bound to pay the costs taxed upon that continuance, the plaintiff the rest.—*Groves v. Seeley*, 275.
4. Section 613 of the civil procedure act, 2 R. S. p. 168, has reference only to actions brought against a defendant not in possession, to quiet title, and not to cases where the defendant is alleged to be in possession and withholding the same, yet suffers judgment to be taken against him without answer.—*Ragan v. Haynes*, 348.
5. A motion to dismiss a suit brought by a non-resident for want of a bond for security of costs, should be overruled upon the filing of a sufficient bond by the plaintiff.—*Dowell et al. v. Richardson*, 573.

See RAILROAD COMPANY, 11; RECOGNIZANCE, 6; *The State ex rel. Fisher et al. v. Bridgroom*, 171.

COUNTER-CLAIM.

See RECOUPMENT.

COUNTERFEIT BANK NOTE.

See INDICTMENT, 2, 3, 4.

COUNTY COMMISSIONERS, BOARD OF.

1. Section 25 of ch. 20, 1 R. S. 1852, providing for allowances by county commissioners to clerks, sheriffs, &c., for extra services, is repealed by §§ 5 and 35, ch. 49, Acts of 1855.—*Board of Comm'rs, &c., v. Potts*, 286.
2. An appeal lies from the decision of a county board upon a claim by a county officer for extra services under the statute of 1855, as from any other judicial decision of such board.—*Ibid.*
3. The board of county commissioners being an inferior Court of special and limited statutory jurisdiction, it must appear upon the face of its proceedings that its action was in conformity with the requirement of the statute governing the same.—*Rosenthal v. The Madison, &c., Plankroad Co.*, 358.
4. Thus, an act of 1845 (Laws, p. 54), empowered the county auditor to call special sessions of the board, by giving notice in writing, to each of the commissioners, specifying the purpose for which they are called together; and provided that upon receiving such notice the commissioners should meet and transact the business for which such special session was called. *Held*, in a suit where an order by two commissioners was relied upon (the third not being present), that it should appear that such notice was given, and that such order was upon the subject-matter named in the notice; for at a special session, the board would have no jurisdiction over any business not specified in the notice calling it.—*Ibid.*

See JURISDICTION, 6.

COVENANT.

1. It is no defense to a suit to obtain relief for a breach of a continuing covenant to allege a

former recovery, for a breach of the same covenant; for successive actions may be brought for successive breaches of such a covenant.—*Leach v. Leach*, 271.

2. And where the complaint, in such case, alleges a continuance of the breach down to the commencement of the suit, and the former suit pleaded was commenced a year previously, —*held*, that the former suit only covered prior breaches, and hence, that the defense did not go to the whole cause of action.—*Ibid*.

3. And an answer alleging a former recovery for the same cause of action is bad for the same reason.—*Ibid*.

4. The covenant alleged to be broken was a condition subsequent to a conveyance of real estate. *Held*, that an answer setting up a former recovery, but failing to allege payment of the judgment, is bad; for it is very doubtful whether an unsatisfied judgment recovered upon breach of a condition subsequent, is a waiver of the right to enforce a forfeiture.—*Ibid*.

5. *Quære*, whether the naked right to take advantage of the breach of a condition subsequent by entry, is subject to sale on execution.—*Ibid*.

6. Suit upon the covenants in a deed. Breach, that the lands conveyed were encumbered by a mortgage, which the plaintiff had paid off. Answer, 1. That the plaintiff, when he purchased the lands, had notice of the mortgage. 2. That the mortgage was not due. Demurrer, assigning for cause—1. That the knowledge of the incumbrance was immaterial, as the defendant had expressly covenanted against it. 2. That the mortgage being an incumbrance, the plaintiff had a right to remove it, and sue upon the covenant.

Held, first, that the notice of the incumbrance did not exclude it from the operation of the covenant.

Second, that the vendee had a right to remove the mortgage (even before it was due) and sue upon the covenant.—*Snyder v. Lane*, 424.

See PLEADING, 5.

Of Seizin and Right to Convey.]

See DAMAGES, MEASURE OF, 2.

COVERTURE.

See HUSBAND AND WIFE.

CREDIBILITY.

See WITNESS, 2, 5.

CREDIT.

On Account.]

See LIMITATIONS, 4, 5.

CRIME AGAINST NATURE.

See SLANDER, 2.

CRIMINAL LAW.

1. Indictment for receiving a stolen horse. The state was permitted to introduce testimony tending to show that the person of whom the defendant had received the horse, had stolen a different horse, from another person, at a different time. *Held*, that this was error.—*McIntire v. The State*, 26.

2. Upon an indictment for larceny, evidence is not admissible to show that the defendant has a general disposition to commit that offense; nor that he had been guilty of a similar offense; much less that he had been guilty of a felony of a different character.—*Smith v. The State*, 106.

3. Where an attempt has been made, by exciting the fears of a prisoner, to procure him to make confessions, and there is reason to presume that the attempt had that effect, evidence of his confessions is inadmissible.—*Ibid.*
 4. Sections 96, 97. and 98, 2 R. S. p. 374, with regard to arraignment and pleading, apply alike to prosecutions by indictment and information.—*McJunkins et al. v. The State*, 140.
 5. On appeal, in such cases, the record must disclose an arraignment and a plea pleaded or entered upon the minutes of the Court.—*Ibid.*
 6. A separate trial cannot be demanded as a matter of right, after the jury has been sworn, and the evidence partly heard, even if the statute gives the right, when properly claimed, to persons prosecuted by information.—*Ibid.*
 7. Where there has been no arraignment, and the defendant has not pleaded, *quære*, what would be the effect of a motion to set aside the swearing and impaneling of the jury to enable him to plead?—*Ibid.*
 8. In criminal prosecutions the Court must charge the jury. Upon request by either party, the charge must be in writing. But such request should be made, or written instructions prepared by counsel presented, in time to enable the Court to give them due consideration. Where the request was not made till the Court was proceeding to give an oral charge,—*held*, that it was too late.—*Ibid.*
 9. Under the statute against "notorious lewdness or other public indecency," a prosecution will not lie for using obscene language, or singing obscene songs.—*Ibid.*
 10. The legislature will be presumed to have acted with regard to the settled judicial interpretation of words, where a different rule has not been established by that body.—*Ibid.*
 11. Criminal charges must be preferred with certainty, to the common intent that the Court and jury may know what they are to try—of what they are to acquit the defendant, or for what they are to punish him—that the defendant may know what he is to answer, and that the record may show, as far as may be, for what he has been put in jeopardy.—*Whitney v. The State*, 404.
 12. Thus, the act, or instrument, or both, constituting the basis of a prosecution, should be described with certainty in the official accusation, if possible, and if not, that fact should be stated as an excuse for want of certainty.—*Ibid.*
 13. And the proof must, substantially, correspond with such description.—*Ibid.*
 14. The best evidence must be adduced; as written instruments, themselves, instead of parol evidence of their contents.—*Ibid.*
 15. Thus, in a prosecution for selling lottery tickets, parol evidence of their contents is not admissible, unless it be shown that the tickets themselves cannot be produced.—*Ibid.*
 16. Section 105, 2 R. S. p. 375, providing that where two or more defendants are indicted jointly, any defendant requiring it must be tried separately, does not extend to prosecutions by information.—*Lawrence v. The State*, 453; compare *Lemasters et al. v. The State*, 391.
 17. An information charging that an offense was committed *on or about* a certain day, is not bad for not alleging the offense to have been committed on a day certain. The words *or about*, are surplusage.—*Hardebeck v. The State*, 459.
 18. A person is not liable to a criminal prosecution for destroying timber on lands of which he holds possession by virtue of a fraudulent contract of purchase.—*Howe v. The State*, 492.
- See ERROR, 1; INDICTMENT; JURY, 4, 6, 7, 8; RETAILING SPIRITUOUS LIQUORS; RIOT; SLANDER; WITNESS, 1, 2, 7, 8.

CUSTOM.

1. A local usage or custom must, at least, appear to be long continued, uniform and generally known, to entitle it to consideration in explanation of a contract.—*Harper v. Pound*, 32.

2. The recognition of local usages is, as a general rule, contrary to the public policy of this state: indeed, it seems, that a good usage or custom in this state should, in addition to the common-law requisites, be shown to prevail throughout the state as a single locality.—*Ibid.*
3. *Aliter*, with commercial usages.—*Ibid.*
4. In the absence of words of limitation, the term *to clear*, as applied to removing timber from land, means, to remove all the timber of every size, except the stumps; and parol evidence of the local meaning of the word is inadmissible to explain a written contract.—*Ibid.*

D.

DAMAGES.

1. In a suit upon a promissory note payable in certain railroad scrip, where the maker had failed to pay in such scrip, the market value of the scrip is the measure of damages.—*Parks v. Marshall*, 20.
2. The measure of damages upon a breach of the covenants of seisin and the right to convey is, as a general rule, the purchase-money and interest; but if there has been a technical breach only, and the covenantee has lost nothing, he can recover only nominal damages.—*Overhiser v. McCollister*, 41.

See BAILMENT, 6; RAILROAD COMPANY, 1 to 13; RECOUPMENT; SUBSCRIPTION OF STOCK, 4.

Assessment of by the Court.] See PROMISSORY NOTES, 11.

DEBTOR AND CREDITOR.

1. A bond given by a debtor to secure to one of his creditors a secret preference over the others, as an inducement to him to sign a deed of composition, or other substantially similar instrument, is fraudulent and void, notwithstanding the creditor stipulating for such preference may have been the last to sign such instrument: and the debtor himself may set up the fraud, in defense of a suit upon the bond.—*McFarland et al. v. Garber*, 151.
2. Good faith is required in every arrangement or settlement made by an embarrassed debtor and his creditors, whether it amount strictly to a composition deed or not.—*Ibid.*

See EXECUTION, 2; SPECIFIC PERFORMANCE; *Jones v. Gott*, 240.

DECEDENTS' ESTATES.

See EXECUTORS AND ADMINISTRATORS.

DECEIT.

See FRAUD; *Cronk v. Cole*, 485.

DECREE.

See DOWER, 2.

DEDICATION.

See WAYS, 2.

DEED.

What constitutes the delivery of a deed is much a question for the jury in each case. A deed may be delivered by words without actions; or by actions without words; or without being actually handed over. Once delivered, its detention by the grantor subsequently, does not divest the title of the grantee. But it seems, that, to be delivered, the deed must pass under

the power of the grantee, or some person for his use, with the consent of the grantor.—*Dearmond et al. v. Dearmond*, 191.

See CONVEYANCE; ESTOPPEL; HUSBAND AND WIFE, 1; LOTTERY, 6.

DEFAULT.

Motion to set aside a judgment by default, and for leave to plead. Two days after judgment, affidavits were filed to the effect that the defendant had before the commencement of the suit, settled with the plaintiff, and paid the damages sued for; that the defendant had employed an agent to employ counsel and defend the suit, who had failed, owing to a misunderstanding as to the Court and term, to attend to it; that defendant was compelled to be absent from the state till after the commencement of the term of the Court; that as soon as the facts were known, counsel were employed, who made application to defend, &c. *Held*, that the defendant was entitled to have the default set aside, with leave to plead, &c.—*Alvord et al. v. Gere*, 385.

See AMENDMENT, 1; JUDGMENT, 9; PRACTICE, 14; PROMISSORY NOTES, 11; SUMMONS, 2.

DEFEASANCE.

See CONVEYANCE.

DEMAND.

If *A.* purchase personal property of *B.*, who afterwards sells it to *C.*—the latter purchasing and holding the same in good faith—*A.* cannot maintain a suit for the property against *B.* and *C.* without first making a demand.—*Sherry et al. v. Picken*, 375.

See BAILMENT, 3 to 6; DOWER, 1; EVIDENCE, 5, 6; VENDOR AND PURCHASER, 2; WAGER, 2.

DEMURRER.

See JUDGMENT, 10; PLEADING, 8, 9, 11, 17, 18, 25, 26.

DEPOSIT.

See BAILMENT; BANKS AND BANKING, 3, 4.

DEPOSITIONS.

1. Each deposition in a cause is an independent paper, and the suppression of one is not necessarily dependent upon the suppression of another.—*Carpenter v. Dame et al.*, 125.
2. The party taking a deposition cannot himself object to it on the ground of want of notice to the other party.—*Ibid.*
3. But where, of several depositions taken by a defendant at the same time and place, and upon the same notice, all but one were suppressed on the motion of the plaintiff—*held*, that the suppression furnished ground for a motion to continue.—*Ibid.*
4. Whether, in such case, the defendant should be permitted to withdraw his remaining deposition, lies in the discretion of the Court, or may be determined by its rules.—*Ibid.*
5. And it seems that the plaintiff may, in the discretion of the Court, read the deposition in evidence before the defendant has offered any evidence, if no objection be made except as to the time of reading it.—*Ibid.*
6. The officer taking a deposition cannot decide legal questions. The objection to the mental capacity of a deponent must be made in the Court to which the deposition is forwarded; and if the Court should hold the witness competent, and the deposition admissible, *quære*, whether the question may be opened again before the jury.—*Ibid.*
7. In this case, the appellees had taken the deposition of the witness, and it was read in evi-

dence at a previous, indecisive trial. It was again used in the trial resulting in the judgment appealed from. No objection was raised to it. Between the two trials, the appellant took his deposition, and still claimed it to be a part of his evidence. The witness lived in Ohio, where evidence to sustain his mental capacity, if impeached, would have to be sought, and it could not be produced upon the trial in progress. *Held*, that the Court wisely exercised its discretion in refusing to permit the mental capacity of the witness to be impeached.—*Ibid*.

8. A deposition taken *de bene esse*, wherein the witness stated that he resided in a certain county, but that he was about to leave the state, may be admitted in evidence, upon proof that the deponent has not returned to his residence.—*Stockton v. Graves*, 294.
9. Where the refusal to suppress a deposition is assigned for error, the bill of exceptions must specify whose deposition it was; for if it was one not read in evidence, no harm was done by the refusal, though it might be erroneous.—*Templeton et al. v. Hunter*, 380.
10. Where the Court authorized a deposition to be taken in *Switzerland*, and ordered it to be certified as depositions taken in this state are certified:—*Held*, that a certificate failing to show that the deponent was duly sworn—by whom the deposition was written—and whether or not the adverse party attended—was not sufficient.—*Thieband v. Sebastian*, 454.

DEPUTY.

See RECOGNIZANCE, 5.

DESCENT.

1. A testator by his will, made at the city of *Paris, France*, after directing the payment of debts, funeral expenses and certain legacies, and bequeathing the annual income of the residue of his estate to his wife during her life, divided the estate, which was all personalty, into six parts, one of which he devised to his brother during his life, and upon his death, the same sixth part was to be divided equally between his children then born. The brother died before the testator, leaving three children. *Held*, that upon the death of the testator, the estate vested, *eo instanti*, in the children, though not to be distributed till the death of the testator's wife.—*Thieband v. Sebastian*, 454.
2. The legatee and his children were residents of this state at their several deaths. *Held*, that at the death of the legatee without a will, the estate passed to his heirs under the laws of this state,—the succession to personal property being governed by the law of the domicil of the intestate.—*Ibid*.

See DOWER, 3.

DESCRIPTION.

Of Mortgaged Premises.]

See MORTGAGE, 7.

DILIGENCE.

See PROMISSORY NOTES, 15.

To Obtain Testimony.] See CONTINUANCE, 3; NEW TRIAL, 7, 8, 11; PRACTICE, 2.

DISCHARGE.

See PROMISSORY NOTES, 5, 6.

DISCRETION.

See AMENDMENT, 2; DEPOSITIONS, 4, 5, 7; EVIDENCE, 12.

INDEX.

DISMISSAL.

See *Orr v. Worden*, 553.

DISTRIBUTION.

See SETTLEMENT OF DECEDENTS' ESTATES.

DIVISION.

Of Real Estate.]

See SHERIFF'S SALE, 7.

DIVORCE.

Application by the husband for a divorce. Cause, abandonment. The plaintiff made affidavit of residence in this state. Notice of the suit was given by publication. The defendant made default. There was evidence of abandonment. The Court dismissed the bill, on the ground that the cause of divorce originated in the state of *New York*, where both the parties at the time resided. *Held*, that this was error.—*Wilcox v. Wilcox*, 436.

DOCKET-FEE.

See RAILROAD COMPANY, 12.

DOMICIL.

See *Thieband v. Sebastian*, 454.

DOUBLE DAMAGES.

See JUDGMENT, 4; RAILROAD COMPANY, 12.

DOUBT.

See PERSONAL PROPERTY.

DOWER.

1. Under the statutes of 1831, 1838 and 1843, a bill for the assignment of dower was bad if it did not allege a demand before the suit was brought.—*Wells et al. v. Sprague*, 305.
2. And where no objection was taken to such a bill by demurrer, but some of the defendants appeared and answered, while as to others the bill was taken as confessed,—*held*, that as to the parties answering, the cause should have been dismissed; and that a decree against the other defendants was erroneous.—*Ibid*.
3. A. died, leaving a second wife by whom he had no children, and several children by a former wife, surviving him; and being, at the time of his death, seized in fee of a tract of land. *Held*, that, under our law of descents (1 R. S. p. 248), the second wife was entitled to one-third of her deceased husband's real estate for life only, as against his children by the former wife.—*Martindale et al. v. Martindale*, 566.

DRAFT.

See BANKS AND BANKING, 4; PLEADING, 22.

E.

EARNEST.

See EMBLEMENTS, 1.

ELECTION.

To fill Vacancy.] See OFFICE, 3, 4, 5; SUPREME COURT.

EMBLEMENTS.

1. Emblements are personal property, and may be sold by parol contract, earnest being paid where the price reaches an amount within the statute of frauds.—*Sherry et al. v. Picken*, 375.
2. Where the sale is complete, the title passes without delivery of the property.—*Ibid.*
3. But where delivery and payment are to be concurrent acts, the purchaser cannot claim possession till he has paid the price; and in such case, the seller has a lien for unpaid purchase-money.—*Ibid.*
4. Where delivery is to precede the payment of the money, possession may be claimed before payment, unless the purchaser be discovered to be insolvent; and if possession be voluntarily delivered without the payment of the purchase-money, the lien is waived, unless secured by mortgage.—*Ibid.*

See CONVEYANCE; *Chapman v. Long*, 465.

ERROR.

1. Error cannot be assigned upon any ruling in a criminal prosecution, which was not made the subject of an exception in the Court below, according to the statute.—*Mullinix v. The State*, 5.
2. Until error is assigned, a case is not in the Supreme Court for any purpose whatever.—*Henderson et al. v. Halliday*, 24.
3. And where error is assigned, if there be no brief in the case, it may be regarded as waived.—*Ibid.*
4. Assignment of error as follows: "That the Court below dismissed the plaintiff's bill, and gave judgment for the defendants, when by the law, said Court should have given judgment for the plaintiff. *Held*, bad.—*King v. Wilkins et al.*, 216.

See DEPOSITIONS, 9; INSTRUCTIONS TO THE JURY, 2, 6, 8; PRACTICE, 5.

ESCROW.

1. One cōobligor may, it seems, deliver a bond to another cōobligor, as an escrow; but the delivery of an instrument to an obligee or payee, or the agent of either, is absolute in law.—*Madison, &c., Plankroad Co. v. Stevens*, 1.
2. Parol evidence is not admissible to vary the legal effect of such delivery, or the terms of the instrument delivered.—*Ibid.*

ESTOPPEL.

An answer setting up an estoppel by deed as to certain plaintiffs, and denying the right of certain others, tenants in common with them, to join in the action, because of such estoppel, but not alleging that they were parties to the deed, is bad on demurrer.—*Lagow et al. v. Neilson*, 183.

See CORPORATIONS, 2, 9, 18.

EVIDENCE.

1. Evidence going to contradict or explain the face of a written contract containing no terms of art or mystery, or ambiguity, is inadmissible.—*Harper v. Pound*, 32.
2. The Court must decide the effect and sufficiency of evidence where the evidence offered can legally produce but one result; but the Court will not assume that but one effect will be produced by the evidence upon a given point, unless such evidence has a fixed legal im-

- port, and is such that no other inference can be drawn from it.—*Roots et al. v. Tyner et al.*, 87.
3. As a general rule, there are no degrees of secondary evidence. *Coman et al. v. The State*, 4 Blackf. 241, overruled as to this point.—*Carpenter v. Dame et al.*, 125.
 4. An instruction to the effect that parol evidence of the contents of a written warranty is not admissible unless it be shown that the instrument is lost, destroyed, or mislaid, is erroneous. Such evidence is admissible where the instrument is in the hands of the opposite party, and he fails to produce it on proper notice.—*Mumford et al. v. Thomas*, 167.
 5. In a suit against a corporation by a person demanding the right to subscribe to the capital-stock, parol evidence of the contents of a note and check tendered in payment for such stock, is inadmissible, unless the proper foundation for its introduction has been laid.—*Ohio Insurance Co. v. Nunemacher*, 234.
 6. And, in such case, evidence of a demand of such stock, and of a tender of such note and check in payment therefor without legitimate evidence of their contents, coupled with proof that no money was offered, is not sufficient to support a finding for the plaintiff.—*Ibid.*
 7. Parol evidence is admissible to give effect to a written instrument, by applying it to the subject-matter, by proving the circumstances under which it was made, whenever without the aid of such evidence the application could not be made in the particular case.—*Evansville, &c., Railroad Co. v. Shearer*, 244.
 8. But such evidence is not admissible where there is no uncertainty in the instrument, especially if it contradict the terms of the instrument itself.—*Ibid.*
 9. Parol evidence of the circumstances surrounding a contract in writing, as well as of the mutual acts of the parties in its fulfillment, is admissible to explain the meaning of the parties in the use of language otherwise obscure.—*Bates et al. v. Dehaven et al.*, 319.
 10. And where the contract was abandoned by mutual consent, and each party did a portion of the work concerning which the contract was made, without regard to its provisions, parol evidence is admissible to show the value of the work done by the parties respectively.—*Ibid.*
 11. Where a plaintiff offered in evidence a letter written by himself, in which he had attempted to charge the defendant with certain sums, as being due by defendant's admission contained in other writings,—*held*, that the plaintiff should have produced those writings, to enable the jury to decide from the tenor of the whole whether he had placed a proper construction upon them.—*Coats v. Gregory*, 345.
 12. The admission of additional evidence, after the examination has closed and the argument commenced, is within the discretion of the Court; and the decision of the Court below in such cases, will not be disturbed by this Court, unless there appears to have been an abuse of the discretionary power.—*Ibid.*
 13. In a suit upon an unsettled account, the proof must go to the separate items; and evidence tending to show that the defendant is indebted to the plaintiff in some amount, is not sufficient to entitle the plaintiff to a verdict.—*Ibid.*
 14. Suit commenced before a justice of the peace for a balance due on a promissory note. Answer, payment. The defendant offered in evidence two orders drawn by him in favor of the plaintiff after the note was due, which he had proven to have been paid. He also offered to prove that the plaintiff had, since the note was due, received from the defendant 8,000 bricks. *Held*, that as the note was a money contract, and the transactions of which proof was offered were had after the breach of that contract, it was necessary to prove not only an agreement to receive the orders and bricks, but a reception of them by the creditor, as a payment or satisfaction of the note; and for that purpose the evidence was admissible under the general issue, to the benefit of which, by the statute, the defendant was entitled.—*Johnston v. Niemeyer*, 850.

15. This was an action on a written conditional subscription of stock. The complaint avers performance by the plaintiffs of the condition, &c. The bill of exceptions shows—that upon the trial the plaintiffs offered the written subscription in evidence, and also certain extracts from the records of the corporation, for the purpose of showing performance of the condition. It then states that the reception of the evidence was “objected to by the defendant, and the objection sustained by the Court.” Whether the objection applied to the whole of the evidence offered, or only to the extracts from the records, is made a question of discussion by counsel. *Per Cur.*—If the objection really applied to the offer to introduce the written subscription, then the cause of objection is so manifest that we would not require it to be specifically pointed out. The writing was the foundation of the suit, and a copy was filed with the complaint, and no verified answer was filed. We cannot conceive of any valid objection to its admission under the pleadings.—*The Evansville, &c., Railroad Co. v. Tressler*, 548.

See ACTION, 2; ATTACHMENT; CONTRACT, 7 to 10; CRIMINAL LAW, 1, 2, 3, 13, 14, 15; DEPOSITIONS; ESCROW; HUSBAND AND WIFE, 1; INSTRUCTIONS TO THE JURY, 1, 3, 7; INTERROGATORIES; LEASE; PARTNERSHIP; PLEADING, 4, 29; PRACTICE, 2, 7, 16, 17; PROMISSORY NOTES, 8, 9, 10, 12; RAILROAD COMPANY, 30 to 32; SHERIFF'S SALE, 1; STATUTES, 1; SUBSCRIPTION OF STOCK, 1; WILL, 4; WITNESS.

EXCEPTIONS.

The following cases were decided in accordance with the ruling in *Zehnor v. Beard*, 8 Ind. R. 96, and *Jolly et al. v. The Terre Haute Drawbridge Co.*, 9 Ind. R. 117, viz.: *Mullinix v. The State*, 5; *Johnson v. Hatch*, 7; *Tyler et al. v. Wilkinson et al.*, 53; *Gates v. Meredith*, 275; *Wampler v. Drybred*, 277; *Dronberger v. Murphy*, 340; *Martin v. Smith et al.*, 341; *The State v. Holton et al.*, 365; *Newman v. Fenters*, 368; *The President, &c., v. Concell*, 381; *The Board of Comm'rs, &c., v. Tufts et al.*, 421; *Reed et al. v. Swinney et ux.*, 422; *Zehnor v. Crull*, 547; *The State ex rel. Long v. Ewing*, 553.

See BILL OF EXCEPTIONS; ERROR, 1.

EXCHANGE.

On Sunday.]

See *Jordan v. Moore*, 386.

EXECUTION.

1. Suit by the vendee of an execution-defendant against a constable, for the recovery of personal property. On service of summons in the original suit, the defendant told the constable to tell the plaintiff, or the justice, to set off his property, and if he had more than 300 dollars' worth, the plaintiff might recover his debt. After execution had issued, defendant sold the property. He was a resident householder, and his property, including that sold, was worth less than 300 dollars. After the sale, execution was levied upon the property in the hands of the vendee. Defendant then claimed it as exempt from execution under the statute of 1852. The execution was issued four months before it was levied.

Held, first, that whilst the execution was in the hands of the officer, and the property in the hands of the execution-defendant, the writ was a lien upon his personal property in the county, and as owner he might claim it as exempt; nor did his sale of the property divest the lien.

Second, that the execution-plaintiff and the officer had notice of the intention of the execution-defendant to claim the benefit of the exemption law; that the failure to levy the execution for four months after it issued, was to some extent an acquiescence in the justness of the claim, which, coupled with the fact that the defendant did not possess 300 dollars' worth

of property, gave him the right to perfect his claim after levy, for the benefit of his vendee.—*Vandibur v. Love*, 54.

2. *Seem*, that a man cannot mortgage land to one of his creditors, who is willing to give him time—his wife not joining in the mortgage—and let his other creditors sell his other property to pay their claims, and then select the mortgaged property as exempt from execution, as against the mortgagee, when he shall seek to foreclose, as well as against the other creditors; nor can the right to select a portion out of many articles of property, render any article actually exempt till the selection has been made.—*Slaughter et al. v. Detiney*, 103.
3. Where an execution-defendant claims land as exempt from execution, and selects a freeholder as an appraiser, and such freeholder is not a householder, the sheriff must choose an appraiser for him.—*Ibid.*
4. Where land mortgaged to secure a debt was, after being claimed as exempt from execution, sold under a decree of foreclosure, and the mortgagee brought suit to recover possession,—*held*, that the execution-defendant, in his answer, need not negative that the mortgage was given to secure the payment of purchase-money; but that the plaintiff must set this up in his reply.—*Ibid.*
5. Suit to recover damages for the unlawful taking of property. Answer, 1. A general denial. 2. That the property belonged to A., who fraudulently conveyed the same to the plaintiffs to defraud his creditors; that while he owned the property it was attached by one of the defendants, who was deputy sheriff, on proceedings for debt by B.; that while the property was in the hands of the sheriff, under attachment, an execution was issued upon a judgment in favor of B., which was levied upon the same property by the same person; that this was the taking complained of. No reply. It was admitted that the taking was upon execution issued upon a judgment, as alleged in the answer. The evidence being closed, the Court instructed the jury that before the defendants could justify under the execution by attacking the transaction between A. and the plaintiffs for fraud, they must show the existence of a judgment against A., and that the judgment could only be shown by producing the record of it. *Held*, that, in the abstract, the instruction was correct; but that upon the pleadings, the averment that there was a judgment against A. must be taken as true.—*Thompson et al. v. Cooper et al.*, 526.

See ACTION, 2; COVENANT, 5; INDICTMENT, 6; SHERIFF'S SALE.

EXECUTORS AND ADMINISTRATORS.

1. The statute of 1843 authorized administrators to lease real property for the payment of debts, where adversary proceedings were had, at least to the extent of making those interested in the land parties, and giving them notice. Where such proceedings were not had the leasing is of no validity.—*Piatt v. Dawes*, 60.
2. In a suit against an administrator upon a promissory note given by his decedent, the Court has not jurisdiction of the person of the defendant, unless he has had actual or constructive notice of the pendency of the proceedings against him.—*Crabb v. Atwood & Co.*, 322.
3. If the clerk fail to present such claim to the administrator, according to § 65, 2 R. S. p. 261, and it be not spread upon the appearance-docket, according to § 66, *id.*, there is no notice.—*Ibid.*
4. The note filed in this case did not contain the names of *Atwood & Co.*, the payees; but, *held*, that it is a sufficient statement of the claim under the statute.—*Ibid.*
5. Petition for the removal of an administrator, filed in vacation. Upon the filing, the clerk gave notice of the pendency of the suit by publication. *Held*, first, that an order of Court for such publication was unnecessary. Second, that the record being silent upon the sub-

ject, it may be presumed that the notice was issued upon a proper affidavit. Third, no citation was necessary.—*Crabb v. Atwood et al.*, 331.

6. Though the notice was for the *January* term, the hearing might be had under such notice at the *April* term, if the cause was regularly continued.—*Ibid.*

See JURISDICTION, 10; SETTLEMENT OF DECEDENTS' ESTATES.

EXEMPTION.

Of Property.]

See EXECUTION, 1 to 4.

EXHIBIT.

See PLEADING, 1, 2.

EXTENSION.

Of Time of Payment.]

See PROMISSORY NOTES, 5, 6.

EXTRA SERVICES.

See COUNTY COMMISSIONERS, BOARD of, 1, 2.

F.

FEEES.

See JUDGMENT, 3; *Cowdin v. Huff*, on p. 85.

FENCES.

See RAILROAD COMPANY, 9, 10.

FOREIGN WILL.

See WILL, 4.

FORGERY.

See INDIOTMENT, 2, 3, 4, 7.

FORM.

Of Judgment.]

See JUDGMENT, 5.

FORMER CONVICTION.

A conviction for a riot, upon regular proceedings before a justice of the peace, bars a prosecution for the same offense in the Common Pleas.—*Trittip v. The State*, 343.

FORMER RECOVERY.

See COVENANT, 1 to 4.

FRAUD.

Action commenced before a justice of the peace, for fraud in the sale of personal property. The complaint alleges that on, &c., the defendant sold the plaintiff a mare, for which he paid him 119 dollars, by giving his note, with security, due, &c.; that the defendant fraudulently represented the mare to be only eight years old, knowing her to be ten or twelve years old; that she was not worth as much as if she had been of the age represented. It was objected to this complaint—1. That the action was prematurely brought, the note not being

due, and nothing having been paid toward the price of the animal. 2. That it does not allege that the animal was of less value than the contract price. *Held*, that the complaint was sufficient in an action commenced before a justice of the peace.—*Gray v. Rich*, 430.

See CORPORATIONS, 13, 17; DEBTOR AND CREDITOR; EXECUTION, 5; HUSBAND AND WIFE, 3, 4, 5; LOTTERY, 6; MISTAKE; MORTGAGE, 2; PLEADING, 2; REPRESENTATIONS, 3; VENDOR AND PURCHASER, 1; WITNESS, 4; *Abey v. Bennett*, 478; *Cronk v. Cole*, 485.

FRAUDS, STATUTE OF.

1. Where a purchaser entered into possession of real estate under a parol contract of sale, the consideration of which was that he should support the grantor and his wife for life, and he did so, and also made valuable improvements,—*held*, that the contract was taken out of the statute of frauds.—*Stater et al. v. Hill*, 176.
2. A bill of sale of goods by a failing debtor, purporting to vest the property absolutely in the vendee in trust for a third person, in consideration of a previous indebtedness of the vendor to such third party, arising out of a breach of trust, is not within § 8 of the statute of frauds.—*Jones v. Gott*, 240.

See CONTRACT, 4; EMBLEMENTS, 1; *Sutton v. Sears*, p. 224, *et seq.*

FREEHOLDER.

See EXECUTION, 3; JURY, 1, 2.

FUTURE BENEFITS.

See RAILROAD COMPANY, 8.

G.

GAMING.

See CONTRACT, 3.

GATE.

See WAYS, 1.

GENERAL ISSUE.

See EVIDENCE, 14; PLEADING, 8, 9, 20.

GIFT ENTERPRISES.

See LOTTERY, 2, 3.

GOVERNOR.

See OFFICE, 4, 5;

GROWING CROPS.

See CONVEYANCE; EMBLEMENTS.

GUARANTY.

See ACTION, 1.

GUARDIAN AND WARD.

1. The Court cannot refuse a guardian's claim for services, because he does not show that he has not used the money in his hands.—*Nettleton, Ex Parte* 352.
2. A suit against a guardian upon a contract made by him touching his ward's estate, is personal against the guardian, and not against him in his fiduciary capacity.—*Stephenson et al. v. Bruce*, 397.
3. Hence, he cannot, by resigning, cease to be a party to the suit and be made a witness.—*Ibid.*
4. A direction in the judgment in such a case that the levy be made of the effects of the ward, is error; but it will be deemed to be amended in the Supreme Court.—*Ibid.*

GUEST.

See INNKEEPERS.

H.

HEIRS.

See SETTLEMENT OF DECEDENTS' ESTATES, 4.

HIGHWAYS.

See WAYS.

HIRING.

Of Horse and Buggy.] See *Burkham v. Pierce et al.*, 467.

HOUSEHOLDER.

See EXECUTION, 1, 3; JURY, 1, 2.

HUSBAND AND WIFE.

1. Suit by a widow to obtain the cancellation of a deed made by her deceased husband. It was alleged in the complaint that the deed sought to be canceled was secretly made by the husband previous to his marriage with the plaintiff; and it is claimed that its execution was a fraud upon her marital rights. The defendants offered a witness to prove that a short time after the date of the deed the plaintiff was receiving witnesses addresses as a suitor, and was under a promise of marriage with him. The Court refused the testimony as irrelevant. *Held*, that this was error.—*Dearmond et al. v. Dearmond*, 191.
2. The principle of the common law, by which the husband was entitled to receive the property of the wife to aid him in paying her debts contracted before coverture and in supporting her during its existence, does not apply in a case by the wife against the husband.—*Ibid.*
3. Generally, the owner of property has a right to dispose of it to whom he pleases; but the right must be exercised without fraud.—*Ibid.*
4. Thus, if a man or woman represent to the other, as an inducement to marriage, that he or she is the owner of certain property, and the marriage, in part upon such consideration, should be consummated, a secret voluntary conveyance of such property before the marriage, by one of the parties, would, it seems, be a fraud upon the other.—*Ibid.*
5. But evidence that the property was conveyed before the parties contemplated marriage, would tend to repel the inference of fraud.—*Ibid.*
6. At common law, coverture disabled the wife to convey her property, real or personal, with-

out the consent of her husband, unless by virtue of some trust or power of appointment.—*Reese v. Cochran*, 195.

7. The provisions of our statutes enlarging the rights and increasing the powers of married women touching property, were not intended "to destroy the community of interest between husband and wife," &c., but rather, to secure to married women, during their lives, such means of support as they might possess, for themselves and families.—*Ibid*.
8. By our statutes, a married woman cannot convey her separate property, either real or personal, without the consent of her husband.—*Ibid*.
9. A husband, holding lands in trust for his wife, cannot, after her death, make a valid sale thereof; and a decree against him to enforce an agreement on his part to convey the same is erroneous.—*Fulton v. Carey*, 570.

See WILLS, 2.

I.

IDEM SONANS.

See VARIANCE, 2.

INDIANA CENTRAL RAILWAY COMPANY.

See RAILROAD COMPANY, 5.

INDIANAPOLIS AND BROWNSBURGH PLANKROAD COMPANY.

See PLANKROAD COMPANY.

INDICTMENT.

1. The word *said*, in an indictment, will be referred to the next antecedent only when the plain meaning requires it.—*Wilkinson v. The State*, 372.
 2. An indictment for passing a forged and counterfeit bank note with intent to defraud, need not aver that the person to whom the note was passed did not know that it was counterfeit.—*Ibid*.
 3. *Quære*, whether the intent to defraud must exist towards the person to whom the counterfeit money is passed, or whether it may not exist towards third persons.—*Ibid*.
 4. *It seems*, that an indictment in the words of the statute, alleging the passage of the counterfeit with intent to defraud generally, would be good; but that where the intent to defraud a particular person is averred, it must be proved.—*Ibid*.
 5. Indictment as follows: "*State of Indiana v. John Campbell*.—Indictment for larceny, in the Allen Circuit Court, at November term, 1857: The grand jury of the county of Allen, in the state of Indiana, upon their oath, charge that on the 4th day of November, 1857, at said county of Allen, in said state of Indiana, feloniously did steal, take and carry away one twenty-dollar gold coin, money of the United States of America, of the denomination and value of twenty dollars, the personal goods of one Charles W. Waldin, contrary to the form of the statute in such case made and provided." Signed, &c. *Held*, bad: the indictment does not charge any person with the commission of the larceny.—*Campbell v. The State*, 420.
 6. Indictment in two counts against a constable for failing to pay over money. The first count charged a demand of the money by the execution-plaintiff, and a failure to pay to him. The second count charges a failure by the constable on the expiration of his term of office, to pay the money to the justice of the peace. The indictment was predicated upon the act of 1855.
- Held*, first, that by § 3, 2 R. S. p. 480, it was optional with the constable to pay the money

over to either the execution-plaintiff or the justice, and the act of 1855 does not change the law.

Second, that the first count was bad for not averring non-payment to the justice; and an averment in the count that the defendant then and there had the money, referring to the time when he collected it, does not aid the defect. The count should have alleged a failure to pay to either the justice or the execution-plaintiff.

Third, that the second count was bad for not averring non-payment to the execution-plaintiff.

Fourth, that each count in an indictment must be sufficient in itself; that averments in one count cannot aid defects in another.—*The State v. Longley*, 482.

7. In an indictment for stealing gold coin, to say *United States* gold coin, is the same as to say current gold coin of the *United States*, &c.; and where the several denominations and the value of such coin are alleged in dollars and cents, it may be presumed that the Court and jury will know that a coin of the value of ten dollars is an eagle, &c.—*Daily v. The State*, 536.

8. If the Circuit Court should sustain a conviction upon a bad indictment, the Supreme Court would set the defendant at liberty.—*Ibid*.

See CRIMINAL LAW, 11, 12; JURY, 8.

INJUNCTION.

An injunction will lie to prevent the commission of a mere trespass only in cases where irreparable injury would result and the plaintiff has no other remedy.—*Bolster v. Catterlin*, 117.

INNKEEPERS.

An innkeeper is only *prima facie* liable for loss or damage to goods of his guest, while in his possession; and he may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants for whom he is responsible.—*Laird v. Eichold et al.*, 212.

INNUENDOES.

See SLANDER, 2.

INSOLVENCY.

See *Jones v. Gott*, 240.

INSTRUCTIONS TO THE JURY.

1. An instruction inaccurately worded, and erroneous as an abstract proposition, is nevertheless right, if it is correct in its application to the evidence, and not calculated to mislead the jury.—*Roots et al. v. Tyner et al.*, 87.

2. An appellant cannot assign as error an instruction in his favor.—*Ibid*.

3. An instruction prayed should be based upon facts assumed to be proved by *all* the evidence bearing upon them, and not by a portion only of the evidence.—*Ibid*.

4. An instruction too narrow to cover the merits of the case, should be refused.—*Ibid*.

5. The Court is not bound to give an instruction unless it ought to be given precisely as prayed.—*Ibid*.

6. A party cannot assign as error the refusal of an instruction, if the Court has given an instruction of the same purport, equally favorable.—*Mumford et al. v. Thomas*, 167.

7. Instructions given to the jury, if not in themselves erroneous under a supposable state of facts, will, in the absence of the evidence, be presumed to be correct; and instructions re-

fused will, in that state of the record, be presumed to have been incorrect.—*Coyner v. Lynde, et al.*, 282.

8. An instruction asserting a correct legal principle may be rightly refused for any one of at least three reasons—1. That it is not pertinent to the particular case, as made by the evidence. 2. That it was not handed up to the judge for his examination at a proper time. 3. That it was clearly embraced in instructions given. And where the refusal of an instruction is assigned for error, the record must exclude the presumption that it was given for a sufficient reason.—*Fitzgerald v. Jerolaman*, 338.
9. Where an instruction is given narrower than the issues made by the pleadings, and yet assuming to cover the whole question in dispute, this Court will presume, the record not showing the contrary, that the parties, on the trial, had limited their controversy to the ground covered by the instruction; so that, in its application to the case it was right, if asserting no incorrect principle of law.—*Legget v. Harding*, 414.

See CRIMINAL LAW, 8.

INTERPRETATION.

See CRIMINAL LAW, 10.

INTERROGATORIES.

Suit by a plasterer to enforce a mechanic's lien. The defendant, with his answer, filed these interrogatories: How much of the work was one coat and skim? and how much two coats and skim? Is there any difference, and if so what, between one coat and skim and two coats and skim? Answer, denying that any part of the work was done with one coat and skim. Objection, that the answer does not state the difference in price. *Held*, that in view of the indefiniteness of the interrogatories, the answer was sufficient.—*Deming v. Patterson*, 251.

See CONTINUANCE, 2; PLEADING, 1.

INTOXICATION.

See CONTRACT, 1, 2.

ISSUE.

See INSTRUCTIONS TO THE JURY, 9; PLEADING, 3, 4, 16, 21; PRACTICE, 3, 6, 11.
Burden of.] See ARGUMENT.

J.

JUDGMENT.

1. The Court, on motion, will set off judgments of the same or of different Courts.—*Hill v. Brinkley*, 102.
2. Where one of the judgments thus set off has been assigned, the Court will not except the amount of a lien thereon of which the assignee had no notice.—*Ibid*.
3. In this state, attorneys have no general lien on judgments for fees.—*Ibid*.
4. A judgment for double the amount of a finding against a railroad company under the statute touching the destruction of cattle (Acts of 1853, p. 113), is erroneous.—*The Evansville, &c., Railroad Co. v. Kargus*, 182.
5. In a suit upon a mechanic's lien, a judgment, in the usual form, for the amount of the finding and costs, closing with a statement that the property described in the complaint is liable

- to pay the judgment, and ordering the same to be sold as other lands are sold on execution, is sufficient in point of form.—*Deming v. Patterson*, 251.
6. Section 384, 2 R. S. p. 124 applies only to cases where no complaint, containing a copy of the cause of action, or accompanied by the cause, is filed. In such case, the judgment, to bar another action for the same cause, should contain the statement provided for in that section.—*Stebbens v. Cubberly*, 301.
 7. A judgment is sufficiently certain in fixing the amount if it recite it.—*Burge v. Shirk*, 396.
 8. Where no valid cause of action, either at common law or by virtue of any statute, is set up in the complaint, the plaintiff is not entitled to judgment, though a verdict be found in his favor.—*Indianapolis, &c., Railroad Co. v. Davis*, 398.
 9. Application upon affidavit to set aside a judgment rendered by default in a suit upon a promissory note, in October, 1853. At the January term, 1855, the Court refused to set it aside. The affiant said he mistook the Court in which his cause was pending. *Held*, that the case is not within any of the statutes authorizing the Circuit and Common Pleas Courts to set aside judgments.—*Robertson v. Bergen*, 402.
 10. Entry of judgment without disposing of a general demurrer is error.—*Kegg et al. v. Welden*, 550.

See DEFAULT; EXECUTION, 5; GUARDIAN AND WARD, 4; RAILROAD COMPANY, 11; VACATION OF JUDGMENT.

<i>Of Justice of the Peace.</i>]	See <i>Johnston v. Pitcher</i> , 378.
<i>Reversal of.</i>]	See COSTS, 1, 2.
<i>On Pleadings.</i>]	See PLEADING, 6.

JUDGMENT BY DEFAULT.

See AMENDMENT, 1; DEFAULT.

JUDGMENT, CONFESSION OF.

In a suit upon an account before a justice of the peace, the defendant made a written offer to confess judgment, which the plaintiff accepted, and judgment was rendered accordingly. On appeal to the Circuit Court, the written offer was transmitted with the other papers. On the calling of the case, the plaintiff moved that the appeal be dismissed; whereupon the defendant, upon affidavit that he had verbally withdrawn the written offer before the justice, moved for a *certiorari*, which motion the Court overruled, and dismissed the appeal. *Held*, that there was no error.—*Lewis et al. v. Morrison*, 394.

JUDGMENT NON OBSTANTE VEREDICTO.

In an action against the trustees of the *Wabash and Erie Canal* for the killing of a horse by the falling of a bridge, the complaint did not aver that the plaintiff exercised reasonable care, nor that the injury happened without his fault. But one paragraph of the answer set up affirmatively that the injury happened through the carelessness and negligence of the plaintiff, to which there was no reply. *Held*, that the defendant was entitled to judgment on the pleadings, notwithstanding a verdict for the plaintiff.—*The Board of Trustees, &c., v. Mayer*, 400.

JURISDICTION.

1. The Common Pleas has not jurisdiction of a complaint demanding judgment for 1,000 dollars. STUART, J., dissents.—*Vauter v. Grant et al.*, 7.
2. A justice of the peace is not a state or county officer, within the meaning of § 11 of the act organizing the Court of Common Pleas.—*Mills et al. v. The State ex rel. Barbour et al.*, 114.

3. The Court of Common Pleas has jurisdiction of a suit upon the official bond of a justice of the peace.—*Ibid.*
4. Suit upon a note governed by the law merchant. One of the defendants resided in *Tippecanoe*, and others in *Vigo* county. All were served with process. *Held*, that the suit was rightly instituted in *Tippecanoe* county, as one of the defendants resided in that county; and the Court, therefore, had jurisdiction of the parties, as well as of the subject-matter.—*Scott et al. v. Millard*, 158.
5. A justice of the peace has not jurisdiction where the sum demanded is over 100 dollars.—*The Evansville, &c., Railroad Co. v. Kargus*, 182.
6. The Court of Common Pleas has not jurisdiction of an appeal from a decision of a county board under §§ 9, 10, 1 R. S. p. 102.—*The Board of Comm'rs, &c., v. Weasner*, 259; *The Board of Comm'rs, &c., v. Brown*, 545.
7. The Court of Common Pleas has not jurisdiction of an action to foreclose a mortgage for 1,000 dollars or more.—*Trew et al. v. Gaskill*, 265.
8. The Circuit Court having general jurisdiction, an objection to its jurisdiction must be raised by answer.—*Ragan v. Haynes*, 348.
9. Where the Court below has taken jurisdiction and rendered judgment, the presumption, on appeal to the Supreme Court, is in favor of the jurisdiction.—*Ibid.*
10. The Circuit Court has exclusive jurisdiction of suits on the bonds of administrators, &c., where the damages claimed are laid at 1,000 dollars or upwards.—*The State ex rel. Clark v. Turner et al.*, 411.

See AMENDMENT, 3, 4; COUNTY COMMISSIONERS, BOARD OF, 3, 4; EXECUTORS AND ADMINISTRATORS, 2, 3, 4.

Of the Person.]

See VENUE, 2, 3.

JUROR.

See JURY.

JURY.

1. Under the statute of 1852, a freeholder is not a competent juror unless he be also a householder.—*Carpenter v. Dame et al.*, 125.
2. *Quære*: Does the word *householder* as used in that statute mean a holder in fee or a leaseholder of a house? or does it mean a housekeeper, or the head of a family occupying a house?—*Ibid.*
3. *It seems* that the husband of a sister of a decedent leaving issue, is not a competent juror in a suit brought by the widow.—*Dearmond et al. v. Dearmond*, 191.
4. In criminal cases, the jury have a right to determine the law as well as the facts.—*McCullough et al. v. The State*, 276.
5. The affidavits of jurors may be received in support of their verdict; but not to impeach it. Much less will the statement of jurors, not under oath, be received to impeach their verdict.—*Elliott v. Mills*, 368.
6. At common law, the jury were, in criminal cases, the exclusive judges of the evidence; but they were bound to believe the law to be as the Court stated it in the charge.—*Williams v. The State*, 503.
7. But the constitution of 1851 (art. 1, § 19), changed the rule; the jury are now the exclusive judges of the law and the evidence.—*Ibid.*
8. By the constitution, the jury are the exclusive judges of the law and the facts, in criminal cases, where they acquit; but they cannot pass upon the validity of the indictment. They judge the case from the evidence, in connection with such knowledge of the law as they

may individually possess or acquire from the argument of counsel, and the instructions of the Court. If they acquit, the defendant is discharged. If they convict, then the Court rejudges the questions of law and of fact.—*Daily v. The State*, 586.

See CONTRACT 11; CRIMINAL LAW, 7, 8; DEED; INSTRUCTIONS TO THE JURY; LIMITATIONS, 5; PERSONAL PROPERTY; PROMISSORY NOTES, 7; RAILROAD COMPANY, 8; SLANDER, 1; WITNESS, 2.

Oath of.] See *Applegate v. Boyles*, 435.

JUSTICE OF THE PEACE.

See FORMER CONVICTION; FRAUD; JURISDICTION, 2, 3, 5; PLEADING, 20, 21; PROMISSORY NOTES, 8, 12; REPLEVIN, 1.

L.

LANDLORD AND TENANT.

See LEASE; SET-OFF, 2; VENDOR AND PURCHASER, 3.

LARCENY.

See CRIMINAL LAW, 2; SLANDER, 1.

LEASE.

Lease of a mill for one year. The lease did not, in the body of it, state when the year was to commence. It was dated on the 2d of *October*, 1854. The defendant proved that it was not actually signed till *February*, 1855. The plaintiff was then permitted to prove that the contract was made and reduced to writing on the 2d of *October*, 1854; that the year was to commence at that date; that possession of the mill was then given and received; and that, by accident or carelessness the agreement was not actually signed till *February*, though it was then signed with reference to its having taken effect on the day of its date. *Held*, that the Court did not err in permitting the proof.—*Legget v. Harding*, 414.

See ACTION, 1; EXECUTORS AND ADMINISTRATORS, 1; PRACTICE, 7.

LETTER.

See EVIDENCE, 11.

LEVY.

See EXECUTION, 1, 5; GUARDIAN AND WARD, 4; SHERIFF'S SALE, 1, 3.

LICENSE.

See RETAILING SPIRITUOUS LIQUORS.

LIEN.

See BAILMENT, 2; EMBLEMENTS, 4; EXECUTION, 1; JUDGMENT, 2, 3.

LIMITATIONS.

1. A suit is not barred by the statute of limitations where the cause of action is concealed by the person liable thereto, until within the period limited. For certain acts amounting to a concealment, see the opinion.—*Earnhart v. Robertson*, 8.
2. An amendment to a complaint generally has relation to the time the complaint was filed;

but this is not so when the amendment sets up a title not previously asserted, involving a question upon the statute of limitations. As to new parties brought in by amendment in such case, the statute continues to run until the amendment is made.—*Lagow et al. v. Neilson*, 183.

3. By our statute of limitations (2 R. S. p. 77, § 216), the time during which a defendant is a non-resident, &c., is not to be computed in any of the periods of limitation fixed by statute, in either real or personal actions; but the concluding part of that section should not be so construed as to allow the law of limitation of another state to be used here in actions for the realty.—*Ibid.*
4. In a suit upon an account which appears upon its face to be barred by the statute of limitations, a credit given by the plaintiff within the period of limitation, does not take the account out of the operation of the statute, without proof that such credit was a payment by the defendant.—*Elliott v. Mills*, 368.
5. But where the defendant, when called upon for payment, examined the account, including such credits, and pronounced it correct,—*held*, that the credits were admitted to be correctly entered as payments; and that the jury might infer from such admission a new promise to pay the residue of the debt.—*Ibid.*

See *Johnston v. Pitcher*, 378.

LIQUOR CASES.

The liquor cases in this volume are all like *O'Daily v. The State*, 9 Ind. R. 494. They are the following: *O'Daily v. The State*, 26; *Turner v. The State*, 60; *Howe v. The State*, 423; *O'Daily v. The State*, and eight other cases, 572.

LOCATION.

Of Railroad.] See SUBSCRIPTION OF STOCK, 2; *The Evansville, &c., Co. v. Shearer*, 244.

LOST BOND.

See WITNESS, 4.

LOTTERY.

1. In this state, the sale of lottery tickets is prohibited—no lottery being authorized by statute.—*Whitney v. The State*, 404.
2. *It seems*, that tickets in schemes in aid of schools and churches, and in gift exhibitions, are illegal articles—such schemes being disguised lotteries.—*Ibid.*
3. Such schemes may be prohibited by statute; and such a statute is not an inhibition of a free sale of property, but of a mode of swindling in disposing of property.—*Ibid.*
4. In a prosecution for selling lottery tickets, parol evidence of their contents is not admissible, unless it be shown that the tickets themselves cannot be produced.—*Ibid.*
5. Schemes for the division of property to be determined by chance, are prohibited by law.—*Swain v. Bussell et al.*, 438.
6. Suit to annul and set aside a deed. The consideration of the deed was 1,533 shares in a lottery, or division of property to be determined by chance. The complaint states that the deed was made to the owner and manager of the scheme; but it also shows that the plaintiff was himself a shareholder and participant in the scheme, with notice of its terms and illegal character. *Held*, that he is not in a position to ask the aid of the Courts in this form of action; that he cannot avoid his own act because of fraud and illegality connected with it, in which he shows himself to have been a participant.—*Ibid.*

M.

MALICE.

See SLANDER, 1.

MALICIOUS TRESPASS.

See WAYS, 4.

MARITAL RIGHTS.

See HUSBAND AND WIFE.

MARKET VALUE.

See REPRESENTATIONS, 5.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See RAILROAD COMPANY, 23 to 27.

MECHANICS' LIENS.

See INTERROGATORIES; JUDGMENT, 5.

MENTAL CAPACITY.

See DEPOSITIONS, 6, 7; WITNESS, 5.

MISTAKE.

A. sold to *B.* all his interest in the stock of merchandise, notes and accounts, belonging to the firm of *A.* and *C.*, including the profits that had accrued in trade, and *B.* agreed to pay all the debts of the firm of *A.* and *C.* and to fully indemnify *A.* against any liability for the same. *Held*, that under such an agreement, a simple error on the books of *A.* and *C.*, by which it appeared that the firm was indebted less than it really was, or that it had more due it than was really due, was not, in the absence of fraud and misrepresentation, a matter that *B.* could set up in discharge of his liability on his part of the contract.—*Abey v. Bennett*, 478.

See PLEADING, 2; SETTLEMENT OF DECEDENTS' ESTATES, 1.

MORTGAGE.

1. If personal property mortgaged in another state be removed into this state while yet in the rightful possession of the mortgagor, and here sold, the mortgagee cannot recover it from the purchaser, on condition broken, without pleading the statute of the state where the mortgage was made, to enable the Court to judge whether the instrument has been recorded in accordance with its provisions.—*Blystone v. Burgett*, 28.
2. An admission by an innocent purchaser without notice that the mortgage was made in good faith, is sufficient to explain the badge of fraud implied by the mortgagor's possession; and if the mortgage were otherwise valid in this state, such admission would entitle the mortgagee to recover.—*Ibid.*
3. A chattel mortgage was unknown at common law; but if this were not so, the rule that

the common law may be presumed to exist in a foreign state, so far as it is not modified by statute, is much shaken, if not overthrown, by late decisions.—*Ibid.*

4. Such a mortgage, purporting to be executed in another state, cannot be presumed to have been executed in this state; nor can it be in any way affected by our laws until it has undergone some change under them.—*Ibid.*
5. This Court will give a chattel mortgage such effect as it is shown to be entitled to in the state where it is executed.—*Ibid.*
6. A sale upon the foreclosure of a mortgage, made by a commissioner appointed by the Court for the purpose, with the consent of the parties, cannot be held void collaterally.—*Wilkins v. De Pauw*, 159.
7. A complaint to foreclose a mortgage must contain a description of the mortgaged premises, and allege that the mortgage was duly recorded in the county where the same are situate.—*Magee v. Sanderson*, 261.
8. Complaint to foreclose a mortgage. Decree of foreclosure and sale rendered. The complaint did not allege that no proceedings had been instituted on the notes, &c. Under the statute of 1843, this was expressly made necessary.—*Deam v. Morrison et al.*, 367.
9. By the statute of 1852 such proceedings should be set up by way of defense.—*Ibid.*
10. The note did not waive appraisement laws. The mortgage did in express terms. If the note and mortgage are regarded as one contract, the waiver extended to both. If regarded as separate contracts, the waiver is good as to the mortgage contract, and the appellant could have prevented a resort to that by paying the note.—*Ibid.*

See COVENANT, 6; EXECUTION, 2, 4; JURISDICTION, 7; PARTIES, 6; SHERIFF'S SALE, 6, 7, 8.

MOTION FOR A NEW TRIAL.

See NEW TRIAL.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 4, 5; SCHOOLS.

MUTUALITY.

See SET-OFF, 5.

MYSTERY.

See EVIDENCE, 1.

N.

NAMES.

Change of.]
Of Parties.]
Idem Sonans.]

See CORPORATIONS, 16.
See PARTIES, 10; PROMISSORY NOTES, 10.
See *Alvord et al. v. Moffatt*, 366.

NE EXEAT.

1. In the practice under the statute of 1852 touching the proceedings upon the writ in the nature of a *ne exeat regno*, a complaint, showing a *prima facie* case, as well as an affidavit and a bond, must be filed before the order of arrest can issue.—*Ramsey et al. v. Foy*, 493.
2. If such writ issue without a complaint having been filed, it should be quashed.—*Ibid.*

3. But in this case, no motion was made to quash the writ; and the jury found specially that the defendants did not intend to leave the state, &c.; that the debt was not due when the proceeding was commenced, but that it was due at the time of the verdict. *Held*, that the writ should have been set aside and the defendants discharged on the return of the verdict—which, in the absence of an appearance, would leave the case standing as if a complaint had been filed and no process issued, to be continued of course.—*Ibid*.
4. But the defendants in this case having appeared, a judgment on the verdict for the amount found due, was affirmed.—*Ibid*.

NEGLIGENCE.

See JUDGMENT NONOBSTANTE VEREDICTO; RAILROAD COMPANY, 3, 13, 16, 23, 27.
In using hired Horses and Buggy.] See *Burkham v. Pierce et al.*, 467.

NEW AGREEMENT.

See CONTRACT, 5, 6.

NEW ISSUE.

See PLEADING, 12.

NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 7, 11; PRACTICE, 2.

NEW PARTIES.

See LIMITATIONS, 2.

NEW PROMISE.

See LIMITATIONS, 5.

NEW TRIAL.

1. The submission of a cause to this Court on an agreed statement of facts does not excuse the failure to move for a new trial below.—*McDonald et al. v. Stader et al.*, 171.
2. Proceeding to obtain partition of real estate. The record showed that exceptions were taken to the finding and judgment of the Court; but no motion for a new trial was made, so as to enable the Court to review its finding or embody the evidence in a bill of exceptions. *Held*, that this class of cases cannot be distinguished from ordinary adversary proceedings, in which such motion is necessary to present the questions attempted to be raised in this case.—*Griffin et al. v. Lynch et al.*, 217.
3. Motion for a new trial made and overruled, and exceptions taken; but no written reasons for a new trial were filed in the Court below. *Held*, that there was nothing to be determined.—*Howes et al. v. Halliday*, 339; *The Lagro, &c., Plankroad Co. v. Eriston*, 342.
4. In a suit in chancery, where the code of 1852 was in force at the time of the finding or decree, the failure to move for a new trial is fatal to an appeal to the Supreme Court.—*McGregor et ux. v. Aze et ux.*, 362.
5. Where the evidence is not in the record, the ruling of the Court below in refusing a new trial will not be reviewed.—*Applegate v. Boyles*, 435.
6. The simple fact that a party was surprised by the testimony of one or all of his witnesses, or at the result of the trial of his cause, is not a sufficient ground for granting him a new trial.—*Ruger v. Bungan*, 451.
7. So, the fact that a party has discovered new evidence, will not secure him a new trial,

unless he show that he used due diligence to obtain that evidence before the trial which has been had.—*Ibid.*

8. Such diligence cannot be inferred, when the party alleges surprise at the testimony of his other witnesses.—*Ibid.*
9. The Supreme Court will not readily review the decision of an inferior Court in setting aside a verdict and granting a new trial.—*Cronk v. Cole*, 485.
10. Where there was no motion for a new trial, this Court will not pass upon the correctness of the finding of the Court below.—*Filson v. Bleeker et al.*, 544.
11. The affidavit of a witness that he would have testified more in detail upon certain points, if he had been more minutely examined, is not sufficient to sustain an application for a new trial upon the ground of newly discovered evidence, where there is nothing in the record showing that the party was not aware of the facts of which the witness might have testified, and nothing in reference to diligence is shown.—*Beard et ux. v. The First Presbyterian Church, &c.*, 568.

See PRACTICE, 1, 2, 13, 20; VACATION OF JUDGMENT.

NON-PAYMENT.

Notice of.]

See ORDERS, 3.

NON-RESIDENT.

See AFFIDAVIT; COSTS, 5; DIVORCE; LIMITATIONS, 3.

NOTICE.

See DEPOSITIONS, 2, 3.

To County Comm'rs.] See COUNTY COMM'RS, BOARD OF, 4.

Of Proceedings against Adm'r.] See EXECUTORS AND ADM'RS, 2, 3, 5.

Of Vacancy and Election.] See OFFICE, 4, 5.

Of Non-Payment.] See ORDERS, 3.

NOTORIOUS LEWDNESS.

See CRIMINAL LAW, 9.

O.

OBSCENITY.

See CRIMINAL LAW, 9.

OBSTRUCTION OF GUTTER.

If a person in building obstruct a gutter with building-materials, and thereby cause water to flow into the cellar of another, he is liable in damages.—*Ball v. Armstrong*, 181.

OFFICE.

1. To constitute a complete and operative resignation of an office, there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment.—*Biddle v. Willard*, 62.
2. A prospective resignation may be withdrawn at any time before it is accepted; and after it is accepted, it may be withdrawn by the consent of the authority accepting, where no new rights have intervened.—*Ibid.*
3. Such a resignation creates no necessity for an election.—*Ibid.*

4. The duty of the Governor, upon receiving a resignation creating a vacancy in a judicial office, is to appoint a successor; this is the only notice he is required to give of the existence of the vacancy.—*Ibid.*
5. And should the Governor communicate a knowledge of such resignation to the public, the communication would not be such legal notice of the fact, as to make it the duty of the clerks of the several counties to give notice of an election.—*Ibid.*
6. The act of 1855 (ch. 11) "to fix the commencement of the terms of certain county officers, and to render the same uniform," conflicts with § 2 of art. 6 of the constitution, and is therefore void.—*Howard v. The State ex rel. Vawter*, 99; *Deweese v. The State ex rel. Starr*, 343.
7. When the term of an office is limited by the constitution, it cannot be changed by legislation; nor can the legislature enact a law which would create a vacancy.—*Ibid.*

See SUPREME COURT.

OFFICER.

- Allowance for Extra Service.*] See COUNTY COMM'RS, BOARD OF, 1, 2.
Justice of the Peace.] See JURISDICTION, 2, 3.

OFFICIAL BOND.

- Action upon.*] See ACTION, 2; AUDITOR OF STATE; JURISDICTION, 3, 10.

"ON OR ABOUT."

- Use of the Words.*] See CRIMINAL LAW, 17.

OPEN AND CLOSE.

See ARGUMENT.

"OR."

- The Word.*] See *The State ex rel. Fisher v. Bridegroom*, 170.

ORDERS.

1. If *A.* place notes in *B.*'s hands for which the latter is to account, and afterwards *A.* draw an order on *B.* payable out of the first proceeds of the notes, and *B.* accepts it, it is no defense to a suit on the acceptance for *B.* to say that the notes were put into his hands before the order was drawn.—*Bird v. McElvaine*, 40.
2. An order may be accepted by parol.—*Ibid.*
3. In a suit upon a protested order, the plaintiff is not bound to allege and prove notice of non-payment, if he allege and prove that, at the date of the order, the drawee had no effects of the drawer in his hands, save the amount paid and credited on the order, on presentment.—*Blankenship v. Rogers*, 333.

P.

PARTIES.

1. The code (§§ 17, 18, 19, 2 R. S. pp. 30, 31) substantially reenacts the old equity rules for the joinder of parties.—*Tate et al. v. The Ohio and Mississippi Railroad Co.*, 174.
2. All who are united in interest must join, unless they are so numerous as to render it impracticable to bring them before the Court.—*Ibid.*

3. Those who have a common or general interest may one or more of them bring an action.—*Ibid.*
4. But two or more persons having separate causes of action against the same defendant, though arising out of the same transaction, cannot unite; nor can several plaintiffs, in one complaint, demand several distinct matters of relief; nor can they enforce joint and separate demands against the same defendant.—*Ibid.*
5. In a suit to cancel a deed and for the recovery of real estate and damages for detaining it, one of the defendants, before the commencement of the trial, made oath that he had released his interest to his co-defendants, filing a quitclaim deed as evidence of the fact, and moved that his name be stricken from the list of defendants. The Court overruled the motion. *Held*, that this was not error.—*Dearmond et al. v. Dearmond*, 191.
6. In a suit brought by the assignee to foreclose a mortgage executed to secure the payment of a promissory note, a paragraph of the answer admitting the assignment by denying that the assignee is the real party in interest, but alleging no facts which would enable the Court so to decide, is bad on demurrer.—*Swift et al. v. Ellsworth*, 205.
7. As was formerly the rule in equity, so by our statute, the real party in interest must bring the action, except where the statute has otherwise provided; and in a suit by the assignee of a promissory note, an answer showing affirmatively that the plaintiff is not the real party in interest, and that he is not authorized to sue by any of the statutory exceptions, is good.—*Ibid.*
8. Though a party in his complaint name himself plaintiff, and other persons defendants, it does not follow that all the defendants named will necessarily continue their adverse relation to him throughout the action, and if one of such defendants, being a proper party to the action, cease, in the progress of the pleading, to be adverse to the plaintiff, such defendant cannot be examined as a witness on the plaintiff's behalf.—*Ibid.*
9. Where in a suit by the assignee of a promissory note against the maker, the payee was joined as a defendant, and he failed to demur or answer, and afterwards filed a pleading, in the nature of a reply to the answer of his co-defendant; and the issues formed were such as to enable the Court to determine how much the assignee was entitled to recover from the maker, and what deductions the maker was entitled to for payments made severally to the payee or the assignee, and thus the amount for which the payee would be responsible:—*Held*, that such payee was a proper party to the action.—*Ibid.*
10. Suit against "*Livingston, Fargo & Co., and Wells, Butterfield & Co., as proprietors of, and doing business under the name and style of, the American Express Co.*" There was no appearance below. Judgment for plaintiff. *Livingston & Fargo, Wells & Butterfield* appealed. The summons does not give the names of the defendants differently from the complaint. Judgment against the defendants. *Held*, that the names should have appeared in some part of the proceedings.—*Livingston et al. v. Harvey*, 218.

See GUARDIAN AND WARD, 2, 3; WITNESS, 3, 6, 7.

PARTNERSHIP.

Suit against two persons to recover a demand which accrued against them as partners. The suit was commenced after a dissolution of the partnership had taken place. On the trial, the admission of one of the defendants, made after the dissolution of partnership, touching the accruing of the claim against the firm, was given in evidence, over the objection of the other partner. *Held*, that the admissions of each partner, thus made, were good, at all events, against himself. Hence, the evidence in this case was rightly admitted to charge the person making the admission.—*Hanna et al. v. McKibben*, 547.

See ACTION, 7; PROMISSORY NOTES, 1; *Stephenson v. Cornell*, 475.

PAYMENT.

See EMBLEMENTS, 3, 4; EVIDENCE, 14; PLEADING, 6, 9; PROMISSORY NOTES, 6.
On Account.] See LIMITATIONS, 4, 5.

PENCIL-MARKS.

See PROMISSORY NOTES, 7.

PERFECTING PLEADINGS.

See PLEADING 12, 13.

PERSONAL LIBERTY.

See STATUTES, 2.

PERSONAL PROPERTY.

If in a suit for the value of property wrongfully taken, under circumstances rendering it impossible for the plaintiff to know its amount or value, the defendant fail to show the same, the jury must solve all doubts in relation to amount and value most strongly against the defendant.—*Tea v. Gates*, 164.

PLANKROAD COMPANY.

The *Indianapolis and Brownsburgh Plankroad Company*, organized under the general plankroad act of 1855, had a right to erect a toll-gate on the portion of their road east of *White River* (the road west of the river being completed), though that portion did not exceed one mile. In other words, the bridging of that stream was not a prerequisite to the right to collect toll upon the mile of road east of the river.—*The State v. Royster*, 426.

See CORPORATIONS, 1.

PLEADING.

1. A defendant may answer an interrogatory demanding whether he has a receipt for money paid, without making the receipt an exhibit.—*Earnhart v. Robertson*, 8.
2. But if the receipt be made an exhibit, and there be no reply under oath, its execution stands admitted; but still it may be gainsayed for fraud or mistake.—*Ibid*.
3. Where there was no reply to the answer to a bill, but the parties, by consent, submitted their cause upon the pleadings and evidence as they stood, the Court will intend that the filing of a reply was waived, and that the cause stands at issue on bill and answer, as though a general replication had been filed.—*Ibid*.
4. Evidence admitted under such issue without objection, if consistent with the case made by the bill, may have its full weight in determining the cause.—*Ibid*.
5. Covenant commenced under the old practice. After the code of 1852 came in force, the defendant filed an answer which, though no defense under the old action of covenant, would have been available in chancery. If its allegations had been proved, it would have reduced the plaintiff's damages to a nominal sum, and might have defeated the action. It was rejected. Held, that this was error; the defendant was entitled to the benefit of it.—*Overhiser v. McCollister*, 41.
6. In a suit upon a subscription of stock, the answer alleged payment, and there was no reply. Held, that the defendant was entitled to judgment on the pleadings. *Stoops v. The Greensburgh, &c., Plankroad Co.*, 47.
7. A paragraph of an answer purporting to answer the whole complaint, but really answering but a part of it, is bad.—*Slaughter et al. v. Detiney*, 103.

8. Where a general denial is pleaded, special denials embraced by it are demurrable.—*Ensey v. The Cleveland, &c., Railroad Co.*, 178.
9. Suit upon a subscription of stock. The complaint set forth the article subscribed to, alleged performance on the part of the company, and a subsequent promise to pay, by defendant. Answer, 1. The general denial. 2. Payment. *Held*, that the latter was new matter, not provable under the general denial, and the paragraph setting it up was not demurrable.—*Ibid*.
10. By ch. 18, Acts of 1855, the objection that the complaint does not set forth a sufficient cause of action, may be made on appeal, though not raised in the Court below.—*Bolster v. Carterlin*, 117.
11. Causes of demurrer designating the alleged defects in the pleading to which they relate, with a sufficient degree of certainty, are good, though not assigned in any approved form.—*Lagow et al. v. Neilson*, 183.
12. The Court may permit the parties to perfect their pleadings, at any time, upon the issues formed, before the submission of the case to the jury; but it cannot permit a party to amend so as to present a new issue after the evidence and the argument have been heard.—*Kerster v. Raymond*, 199.
13. *Quære*, whether the Court should permit a reformation of the whole pleadings, at any time, upon cause shown.—*Ibid*.
14. If an answer is valid on its face, and no facts exist peculiarly within the judicial knowledge of the Court, showing it to be a sham defense, it should not be stricken out upon affidavit of its falsity.—*Brown et ux. v. Lewis*, 232.
15. An answer denying the execution of a written instrument, is not invalid because it is not sworn to; but such an answer excuses proof of the execution of the instrument.—*Mages v. Sanderson*, 261.
16. Suit in the Common Pleas upon a promissory note. Answer, that the note was given for real estate; that the vendor gave a bond for a deed on payment, but that he had no title. The bond was neither filed nor copied. Reply, that the obligor could convey "such a title as he undertook to convey in his said bond." The defendant moved that the cause be certified to the Circuit Court, because the title to real estate was in issue. Motion overruled. He then withdrew his appearance. He was called, failed to answer, and judgment was rendered against him by default.
Held, first, that the title to real estate was not in issue; that the pleadings formed no valid, triable issue.
 Second, that by the statute, the bond, or a copy of it, should have been filed.
 Third, that if a party appear and plead, and then fail to appear at the trial, his pleadings stand; but if, after pleading, he withdraw his appearance, his pleadings go with it; that without an appearance a party cannot answer, nor can he have an answer standing where there is no appearance.—*Carver v. Williams*, 267.
17. A demurrer to a complaint pointing out substantially any one of the six defects specified by § 50 of the civil code (2 R. S. p. 38), is sufficient.—*The State ex rel. Robinson v. Leach et al.*, 308.
18. A demurrer under the fifth specification is good in the language of the statute; and where the demurrer is not taken in the language of the statute, but points out a fact necessary to constitute a cause of action, not alleged in the complaint, it is good, so far as it goes, but it does not embrace any objection to the sufficiency of the cause of action, other than that specifically pointed out, although there be other defects that would have been reached by using the language of the statute.—*Ibid*.
19. Complaint in two paragraphs, 1. Upon a special contract; and 2. For work and labor and materials furnished. Motion to strike out the second paragraph, and also to compel the

- plaintiff to elect upon which he would rely, overruled. There was nothing in the record showing the two paragraphs to be for one and the same cause of action. *Held*, that there was no error.—*Bates et al. v. Dehaven et al.*, 319.
20. The general denial, except *non est factum*, is in by law, without being pleaded, in suits before a justice of the peace; and under it, everything but the statute of limitations, set-off, and matter in abatement, may be given in evidence.—*Button v. Lent*, 365.
21. The filing of a bill of particulars of an account, is a sufficient plea of set-off before a justice. No replication is required.—*Ibid*.
22. An issue good before the justice, is good in the Circuit Court on appeal.—*Ibid*.
23. Complaint upon a draft drawn by a contractor upon a turnpike company. The draft, which was a part of the complaint, showed that the sum for which it was drawn was not to be paid until after the last estimate on a certain section of the work, &c. The complaint admitted that the work on that section was abandoned, but sets up, as an excuse for such abandonment, that the amount estimated for work done before the abandonment had not been paid. But it was not alleged that by the terms of the contract, or otherwise, that amount was due before the abandonment. *Held*, that the complaint was bad.—*Milton, &c., Turnpike Co. v. Hall et al.*, 389.
24. Under the code, the use of the traverse in the reply is precisely similar to its use in the answer. It simply puts at issue the truth of the matters alleged.—*Kimberling v. Hall et al.*, 407.
25. Hence, new matter in avoidance of the answer must be specially pleaded: otherwise, it cannot be proved on the trial.—*Ibid*.
26. In the assignment of causes of demurrer, the precise language of the statute need not be used.—*Snyder v. Lane*, 424.
27. Suit upon the covenants in a deed. Breach, that the lands conveyed were encumbered by a mortgage, which the plaintiff had paid off. Answer, 1. That the plaintiff, when he purchased the lands, had notice of the mortgage. 2. That the mortgage was not due. Demurrer, assigning for cause—1. That the knowledge of the incumbrance was immaterial, as the defendant had expressly covenanted against it. 2. That the mortgage being an incumbrance, the plaintiff had a right to remove it, and sue upon the covenant. *Held*, that the causes of demurrer were well assigned.—*Ibid*.
28. A contract cannot be confessed and avoided, and also denied by alleging a different contract, in the same paragraph of the answer. Such allegation is surplusage.—*Cronk v. Cole*, 485.
29. Suit to recover damages for the unlawful taking of property. Answer, 1. A general denial. 2. That the property belonged to A., who fraudulently conveyed the same to the plaintiffs to defraud his creditors; that while he owned the property it was attached by one of the defendants, who was deputy sheriff, on proceedings for debt by B.; that while the property was in the hands of the sheriff, under attachment, an execution was issued upon a judgment in favor of B., which was levied upon the same property by the same person; that this was the taking complained of. No reply. It was admitted that the taking was upon execution issued upon a judgment, as alleged in the answer. *Held*, that the averment that there was a judgment against A. must be taken as true.—*Thompson et al. v. Cooper et al.*, 526.
30. A. sued B. upon three promissory notes, alleging in the complaint, that B. "made his promissory notes," &c. Upon the trial A. offered in evidence three notes, signed—"C. by B." Upon objection they were excluded because they did not tend to prove the averment. *Held*, that this was right.—*Lawton v. Swihart*, 562.
31. Where the complaint is sufficient to bar another suit for the same cause, and it was not

demurred to in the Court below, no question upon its sufficiency can be raised in the Supreme Court.—*Beard et al. v. The First Presbyterian Church, &c.*, 568.

See ACTION, 6; AMENDMENT, 3, 4; ARGUMENT; CONTINUANCE, 2; CORPORATIONS, 12, 18, 19; COVENANT, 1, 2, 3; DOWER, 1, 2; ESTOPPEL; EXECUTION, 4; FRAUD; INDICTMENT; JUDGMENT, 8; JUDGMENT NON OBSTANTE VEREDICTO; JURISDICTION, 8; LIMITATIONS, 2; MISTAKE; MORTGAGE, 1, 7, 8, 9; NE EXEAT, 1, 2, 3; ORDERS, 1, 3; PARTIES; PROMISSORY NOTES, 1, 6, 13; RECOGNIZANCE, 5, 6; REPLEVIN, 1; SET-OFF; SHERIFF'S SALE, 6, 7, 8; SLANDER; SUBSCRIPTION OF STOCK, 5; SURETY OF THE PEACE; VENDOR AND PURCHASER, 2.

POSSESSION.

See EMBLEMENTS, 3, 4; LEASE; MORTGAGE, 1; PROMISSORY NOTES, 14.

POWER OF ATTORNEY.

See ATTORNEY IN FACT.

PRACTICE.

1. Where a motion for a new trial has been overruled, this Court will not interfere with the verdict on the ground that it is not sustained by the evidence, except in extreme cases.—*Bronson v. Hickman*, 3.
2. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence is not merely cumulative; that it was discovered after the trial; that there was no want of diligence; and that it would probably change the result.—*Ibid.*
3. The issue joined in a justice's Court remains in the Circuit Court on appeal.—*Chapman v. Clevinger*, 23.
4. Application to set aside a judgment, on the ground that the party did not know that it was rendered against him. He was present at the trial, and on the return of the verdict moved for a new trial and in arrest of judgment, and no reason appeared for his ignorance. *Held*, that there is nothing in the case.—*Ibid.*
5. Where no objection was made to the sufficiency of a cause of action in the Court below, the objection cannot be taken in error, if there be enough to bar another action for the same cause.—*Harper v. Pound*, 32.
6. An immaterial issue of law left undecided is no cause for a reversal.—*Bird v. McElvaine*, 40.
7. Suit by a guardian of minor heirs against a lessee of the administrator for the use and occupation of a certain shop. The defendant set up his lease, the validity of which the plaintiff denied. The defendant introduced as evidence an order of Court authorizing a sale of the rents and profits for the payment of debts, and a second order, confirming the administrator's report of the leasing of the property. He then offered the lease in evidence, but it was excluded. It was contended that if the orders were all the proceedings authorizing the lease, it was inadmissible; and if they were not, all the proceedings should have been introduced. *Held*, that a party may prove the facts in his case in the order which he may prefer; that it cannot be presumed that if the lease had been introduced, the defendant would have rested his case upon it and the orders; but that, on the contrary, it must be presumed that the proper proceedings had preceded the order of confirmation.—*Piatt v. Daves*, 60.
8. The statute does not require the signature of the judge to be repeated after every entry upon the record, but at the close of each day's proceedings. The transcript in this case is certified by the clerk to be of an entry of record among the proceedings of a given day. This

is sufficient. The Supreme Court will presume the day's proceedings were signed at the close.—*Scott et al. v. Millard*, 158.

9. Motion to set aside an execution and sale. Motion sustained. There was an appeal from a judgment below to the Supreme Court. The judgment was affirmed; but before a session of the Circuit Court after the affirmance, and, of course, without any order of that Court to enter the opinion of the Supreme Court upon the record, the clerk, in vacation, issued an execution upon the judgment. *Held*, that the appeal-bond having been filed, stayed proceedings in the Circuit Court for three years, unless the stay was sooner removed by order of the Supreme Court; that the clerk of the Circuit Court had no authority to act in the premises during that time, if he would have afterwards, till ordered by the Circuit Court; that the certificate from this Court is to the Court, not to the clerk, below.—*Clapper et al. v. Bailey*, 160.
10. Where testimony is objected to, the ground of the objection must be stated.—*Mumford et al. v. Thomas*, 167.
11. The finding of a Court upon issues of fact formed under the old practice, but tried under the new, is treated by this Court as if the suit had been instituted under the code.—*Stater et al. v. Hill*, 176.
12. The Court may permit a new complaint to be filed in place of a previous one lost; and on appeal, if the reasons upon which the Court acted do not appear, they will be presumed to have been sufficient.—*Ferry v. Jones*, 226.
13. Where there was no motion for a new trial, the Supreme Court will not look into the sufficiency of the evidence, though it be otherwise properly in the record.—*Deming v. Patterson*, 251.
14. Where the defendant fails to appear, judgment may be rendered by default, without previously entering a rule for an answer.—*Trew et al. v. Gaskill*, 265.
15. Where the evidence is not in the record, the verdict of a jury will not be disturbed by the Supreme Court, except in extreme cases.—*Coyner v. Lynde*, 282.
16. This Court cannot say that the rejection of evidence was error, where there is nothing in the record showing its relevancy to the case made.—*Miles v. Elkin et al.*, 329.
17. In cases turning upon the weight of evidence, the Supreme Court will seldom interpose, if the evidence tends to support the judgment. *The State ex rel. Blair v. Robeson et al.*, 379.
18. Appearance and answer waive proof of publication.—*Templeton et al. v. Hunter*, 380.
19. Where a motion to strike out a pleading raised a question of fact, and the record did not show what the fact was, the Supreme Court presumed that the motion was correctly overruled.—*The President, &c., v. Conwell*, 381.
20. Where all the evidence is not in the record, this Court cannot judge of the correctness of the ruling of the Court below in the denial of a new trial, or upon any other point arising upon the evidence.—*Harvey v. Ferguson*, 393.
21. An omission which might have been corrected on objection in the Court below, is not available as error on appeal.—*Ruger v. Bungan*, on p. 452.

See ACTION, 6; BILL OF EXCEPTIONS; BRIEFS; CHANCERY; CONTINUANCE; COSTS; CRIMINAL LAW, 6, 7, 8; DEPOSITIONS; DOWER, 2; EVIDENCE, 12; EXECUTORS AND ADMINISTRATORS; INSTRUCTIONS TO THE JURY; JUDGMENT, 1, 2, 3; JURY; NE EX-EAT; NEW TRIAL; PARTIES; PERSONAL PROPERTY; PLEADING, 5, 6, 12, 13; RECOGNIZANCE; SLANDER, 1; SPECIFIC PERFORMANCE; SUBSCRIPTION OF STOCK, 5; TRUSTS, 2; VENUE; WITNESS.

PRACTICE IN THE SUPREME COURT.

See AMENDMENT, 2; APPEAL; BILL OF EXCEPTIONS; BRIEFS; CHANCERY; COSTS, 1, 2;

DEPOSITIONS, 9; ERROR; GUARDIAN AND WARD, 4; JURISDICTION, 9; NEW TRIAL, 1 to 5, 9, 10; PRACTICE, 1, 5, 6, 8, 9, 11, 13, 15, 16, 17, 19, 20, 21; RESERVED CASE; VARIANCE, 1.

PRÆCIPE.

See SUMMONS.

PREFERENCE OF CREDITORS.

See DEBTOR AND CREDITOR.

PROCESS.

See SUMMONS.

PROMISSORY NOTES.

1. In a suit upon a promissory note payable to a certain firm, by several plaintiffs describing themselves as partners composing the firm, proof that they constituted the firm is only required where their title as payees of the note is put in issue by some form of pleading verified by affidavit.—*Rees et al. v. Simons et al.*, 82.
2. A note payable at a bank, is payable in the bank; and a note payable at or in a bank, is payable to the holder, or his agent, in the bank, at its counter.—*Davis v. McAlpine*, 137.
3. Suit by *B.* for the use of *D.*, upon a promissory note. Pleas of payment, and accord and satisfaction, to and with *B.*; and of fraud, want of consideration, &c. Issues. Trial and judgment for defendant. The Court refused to instruct the jury that *M.* could not, by obtaining a receipt from *B.* (the payee of the note) that he had paid the said note to him, prevent *D.* from recovering the amount of the note, from the maker, in the name of *B.*, the payee, if *M.* knew, when he paid the note to *B.* that *D.* was the equitable owner thereof, though it had not been assigned to him by indorsement. Held, that the instruction asserts a correct abstract principle of law.—*Burke v. Moore*, 160.
4. The plaintiff in a suit upon a promissory note, may fill up a blank indorsement to himself upon the trial; but it is unimportant whether the blank be filled up or not.—*Ferry v. Jones*, 226.
5. An agreement between the principal maker and the payee of a promissory note, without the consent of the surety, to extend the time of payment, in consideration of usurious interest, does not discharge the surety.—*Shaw et al. v. Binkard*, 227.
6. In a suit upon promissory notes, an answer admitting the execution as surety, setting up payment as to part, and a discharge as to the balance, by an agreement between the principal and the creditor for an extension of time for a valid consideration paid to the latter, without the consent of the surety,—is good on demurrer.—*Ibid.*
7. The question whether pencil-marks made on a note indicate its cancellation, is properly for the jury; for it could not be said, as a point of law, that such marks imported a cancellation of the note.—*Stockton v. Graves*, 294.
8. Suit upon a promissory note, commenced before a justice of the peace. There was no answer. From the evidence it appeared that the defense was a failure of consideration. There was no testimony as to what the note was given for; but the bill of exceptions stated that it was alleged by the defendant, and not denied by the plaintiff, that the cause had been tried before the justice upon its merits—no one pretending that the note was given for any other consideration than a certain buggy, or that the parties had ever had any other dealings. The evidence was directed to the value, &c., of the buggy, which was in the possession of the defendant. In the absence of pleadings and evidence upon the point—held, that

the statement sufficiently showed that the note was given for the buggy. *Held*, also, that the action having originated before a justice of the peace, evidence of a failure of consideration was admissible without plea.—*Helper v. Jelly*, 382.

9. A promissory note is *prima facie* evidence that it was given upon a valuable consideration, and where there was evidence strongly tending to show a mere accommodation note, without consideration moving from the payee to the maker, yet the jury having passed upon it, the Court would not disturb their verdict.—*Shirkey v. Rutherford*, 414.
10. Suits on notes made payable to *E. M. Bruce & Co.*, and *G. A. Kunkler*. The complaints were by *Eli M. Bruce* and *Henry Bruce*, and *Gustavus A. Kunkler*, and they allege that the notes were payable to them. Copies were set out in the complaint, and the notes admitted in evidence. *Held*, that there was no error.—*Kunkler v. Turnting*, and *Grover et al. v. Bruce et al.* 418.
11. In a suit upon a promissory note and an account, the defendant failed to appear, and judgment was taken by default. The finding was upon the note alone. The Court assessed the damages. *Held*, that there was no error.—*Kaufman et al. v. Forchheimer et al.*, 419.
12. In a suit by the assignee of a promissory note against the indorser, a transcript of a suit by the assignee against the maker, before a justice of the peace, was offered in evidence, by which it appeared that the cause was tried on its merits, and judgment rendered for the defendant, because the note was given without consideration. *Held*, that this record was *prima facie* evidence against the validity of the note, even if the indorser had no notice of the proceedings.—*Tam v. Shaw*, 469.
13. But if the complaint in such case allege such notice, and the answer nowhere deny it, it need not be proved.—*Ibid*.
14. The person having possession of a promissory note, is presumed to be the equitable owner of it, although it be not indorsed by the payee; and such person may transfer it by indorsement in such a manner as to make himself liable to an action by the assignee.—*Ibid*.
15. By such an indorsement, the note is warranted to be valid, and the maker solvent and able to pay it; and diligence to collect of the maker is only necessary in reference to the latter branch of the warranty.—*Ibid*.
16. Where a note is invalid, suit may be brought immediately against the indorser, without having sued the maker.—*Ibid*.

See **BILLS OF EXCHANGE**; **DAMAGES**, 1; **EVIDENCE**, 14; **EXECUTORS AND ADMINISTRATORS**, 2; **JURISDICTION**, 4; **ORDERS**, 1; **PARTIES**, 7, 9; **PLEADING**, 30; **SET-OFF**, 4. *Ownership of.*] See **PARTIES**, 6; *Ferry v. Jones*, 226.

PROOF OF PUBLICATION.

Appearance and answer waive proof of publication.—*Templeton et al. v. Hunter*, 380.

PROTEST.

See **ORDERS**, 3.

PUBLICATION.

See **PROOF OF PUBLICATION**.

Order for.]

See **EXECUTORS AND ADMINISTRATORS**, 5.

PUBLIC INDECENCY.

See **CRIMINAL LAW**, 9.

PUBLIC POLICY.

See CUSTOM, 2; REPRESENTATIONS, 1.

PURCHASE-MONEY.

See DAMAGES, 2; EXECUTION, 4; REPRESENTATIONS, 3; SHERIFF'S SALE, 1; VENDOR AND PURCHASER, 1.

B.

RAILROAD COMPANY.

1. In a suit against a railroad company for damages for injuring cattle, the witnesses estimated the value of the property variously from 30 dollars to 40 dollars. *Held*, that the Court might find the value to be 37 dollars.—*Madison, &c., Railroad Co. v. Herod*, 2.
2. Section 3, ch. 93, Acts of 1853, is unconstitutional.—*Ibid*.
3. The act of March 1, 1853, relative to compensation for animals killed or injured by railroad machinery (Laws of 1853, p. 113), is in the nature of a police regulation designed to promote the security of persons and property passing upon the road; and hence, though the owner of the animal be not an adjoining proprietor, and be guilty of negligence in permitting it to stray upon land adjoining the road, he may recover, if the company has failed to comply with the requirements of the statute.—*The Indianapolis, &c., Railroad Co. v. Townsend*, 38; *The Jeffersonville Railroad Co. v. Applegate*, 49; *The Indianapolis, &c., Railroad Co. v. Meek, Brandon and Hughes*, 502; *The Jeffersonville Railroad Co. v. Dougherty*, 549.
4. But should a person voluntarily place his animal upon the track, it seems he could not recover, but might, perhaps, be regarded as having abandoned his property.—*Ibid*.
5. It is only where this company has taken possession of or appropriated property in the construction of her work, that they may be sued for damages in the mode prescribed by § 3 of the act of January 13, 1849, amendatory of the act of incorporation.—*The Indiana, &c., Railway Co. v. Boden*, 96.
6. But a railroad company is liable for an injury resulting from the construction of their work, as at common law, where no remedy is given by the charter.—*Ibid*.
7. The opinion of a witness as to the amount of damage resulting from the construction or operation of a railroad, is not competent evidence.—*The Evansville, &c., Railroad Co. v. Fitzpatrick*, 120; *The Same v. Stringer*, 551.
8. The jury, in determining the amount of such damages, are to exclude from their consideration all future benefits that may accrue to the owner of the land, from the construction or operation of the road.—*Ibid*.
9. The fact that a landholder is obliged, by the construction of a railroad through his farm, to make additional fences, may be considered in estimating the damages.—*Ibid*.
10. *Quære*, whether a railroad company can be compelled to maintain one-half of a partition fence separating its roadway from an adjoining farm.—*Ibid*.
11. A judgment in a proceeding to assess damages for land taken by a railroad company, which requires that not only the amount assessed by the jury, but also the costs of suit shall be paid before the land shall vest in the company, is erroneous.—*Ibid*.
12. On appeal to the Circuit Court from a judgment by a justice of the peace, against a railroad company for killing stock, a judgment for double damages and a docket-fee, under § 3 of the act of March 1, 1853 is erroneous.—*The Indiana, &c., Railway Co. v. Gapen*, 292; *The Jeffersonville Railroad Co. v. Dougherty*, 549.
13. In a suit against a railroad company to recover damages for stock killed by their cars, at a point on their road where a highway had been established, which highway, though shown to have been abandoned by the public for two years, was not shown to have been vacated,

the plaintiff must prove misconduct or negligence on the part of the company or their agents.—*Ibid.*

14. A railroad company is not liable under the statute of 1853, for an injury to stock resulting from fright at their cars, where the animal was not touched by any car, locomotive or other carriage belonging to the company.—*Peru, &c., Railroad Co. v. Hasket*, 409.
15. A suit brought in the Common Pleas against a railroad company for killing cattle, is not governed by the statute of 1853, but by the common-law rules.—*The Jeffersonville Railroad Co. v. Martin*, 416.
16. Hence, the complaint must charge negligence, unskillfulness, or willful misconduct, on the part of the company or their agents, and that such negligence, &c., was the proximate cause of the injury.—*Ibid.*
17. An agreement by a railroad company to cross a stream north of a certain street, requires them to cross the stream where a northerly line from such street would intersect it.—*The New Albany, &c., Railroad Co. v. McCormick*, 499.
18. Conditional subscriptions of railroad stock may be valid.—*Ibid.*
19. Upon the acceptance of a conditional subscription by the entry thereof by the company upon the record, the contract of subscription is complete and absolute, and the subscriber is a stockholder; and no notice from the company is necessary before bringing suit upon the subscription.—*Ibid.*
20. But if notice of the location according to the conditions were necessary, an agreement that the kind of notice named in the contract should be sufficient would not render invalid any other kind of notice which might be in itself sufficient in point of fact.—*Ibid.*
21. If the stockholder be a resident of a town or city the construction and operation of the road through such town or city would ordinarily be sufficient notice.—*Ibid.*
22. No tender of a certificate of stock is necessary before suit brought. Such certificate does not constitute the title to the stock. The registry of the stockholder's name upon the stock-book of the company, opposite the number of his shares, gives him his title.—*Ibid.*
23. In a suit against a railroad company, by an employè engaged as an engineer in running a train upon the road, to recover for injuries sustained in such service, the plaintiff must allege and prove negligence on the part of the company, by means whereof the injury was caused.—*The Indianapolis, &c., Railroad Co. v. Love*, 554.
24. There is no implied warranty, generally, of the completeness or fitness of the road or rolling stock, as between the company and their employès.—*Ibid.*
25. But there are many exceptions. For instance, if a defect existed in the road which was known to the company, but which it was impossible for them to remove immediately, and in consequence of such defect the road was unsafe but not impassable, and yet they should suffer an employè, in ignorance of the defect, to attempt to pass upon the road, and injury should thereby result to him, the company would be liable. So, on the other hand, if the employè had knowledge of the defect, and the employers had not, the latter would not be liable. And where both parties had such knowledge, each takes the risk, unless the company undertake to give special directions as to the mode of operating.—*Ibid.*
26. Whether it is the duty of the company or of their engineer to see to and keep in safe condition a crossing, or other unsafe point on a railroad, is a question of fact for the jury.—*Ibid.*
27. It seems, that where an injury to an employè of a railroad company resulted from his own negligence or carelessness, in failing to discharge some reasonable duty; or where the employè and the company were equally to blame for the injury, the company is not liable.—*Ibid.*
28. Two of the questions arising in this case were decided in the case of the same company against *Fitzpatrick*, *supra*.—*The Evansville, &c., Railroad Co. v. Cochran*, 560.

29. In a proceeding by a railroad company to appropriate lands for a right of way, the statements of witnesses touching the value per acre of the lands appropriated, are admissible.—*Ibid.*
30. Where the jury, in such a case, were sent to examine the premises, and the record contained nothing in relation to the impression produced upon the minds of the jury by the examination,—*held*, that the evidence was not all in the record, though the bill of exceptions stated that it contained it all.—*Ibid.*
31. Evidence is that which produces conviction on the mind, as to the existence of a fact.—*Ibid.*
32. An ocular examination of the premises alleged to have been injured, might, in this instance, have that effect, as well as an oral detail of circumstances.—*Ibid.*

See CORPORATIONS, 6 to 13, 15; JUDGMENT, 4; SUBSCRIPTION OF STOCK.

RECEIPT.

See BAILMENT, 1; CONTRACT, 7, 8; PLEADING, 1, 2; PROMISSORY NOTES, 3.

RECEIVING STOLEN PROPERTY.

See CRIMINAL LAW, 1.

RECOGNIZANCE.

1. An action upon a recognizance for appearance in the Circuit Court may be brought in the Common Pleas, if the amount is within the jurisdiction.—*McCole et al. v. The State ex rel. Chipman*, 50.
2. Where a justice of the peace has committed a defendant charged with a bailable offense, for failure to enter into recognizance, the sheriff may, before an indictment is found, and without an order of the Court, judge or clerk fixing the amount of bail required, accept bail in the amount specified in the warrant of commitment.—*Ibid.*
3. In a suit upon a forfeited recognizance, where judgment was taken *nisi dicat*, it cannot be objected on appeal that the recognizance was defective.—*Patterson et al. v. The State*, 296.
4. By the statute, the plaintiff or relator, in a suit upon a defective recognizance, may suggest the defect in his complaint, and recover to the same extent as if the recognizance were perfect; and the failure to make such suggestion in the first instance, can always be cured by amendment.—*Ibid.*
5. In this case, the sheriff's deputy returned the recognizance thus: "Taken and approved by me, this 20th day of October, 1852. Wm. J. McIntosh, sheriff; by John Cole, deputy." *Held*, first, that the return was good. Second, that if the defendant wished to put in issue the deputy's authority, he should have raised his objection by answer.—*Ibid.*
6. Under art. 5, 2 R. S. p. 364, the death of the principal in a recognizance, after forfeiture entered, may be pleaded by the bail in bar of an action against him upon the recognizance, except for costs.—*Woolfolk v. The State*, 532.

RECORD.

On Appeal.] See AMENDMENT, 2; NEW TRIAL, 2, 5; PRACTICE, 15, 16, 20.
Of Mortgage.] See MORTGAGE, 1, 7.
Of Foreign Will.] See WILL, 4.

RECOUPMENT.

This Court will not hold that damages for refusing to comply with an arbitration-bond, touching differences growing out of a contract, can be made matter of recoupment, where the

complaint does not indicate that the cause of action had any connection with such contract, and the evidence is not upon the record,—if, indeed, it would in any case; and certainly such damages could not be made matter of set-off.—*Miles v. Elkin et al.* 329.

RE-ENACTMENT.

See STATUTES, 3.

REFORMATION OF PLEADINGS.

See PLEADING, 12, 13.

RELATIONSHIP TO JUDGE.

See VENUE, 2, 3.

RELEASE.

See PARTIES, 5; WITNESS, 4, 6.

RENT.

See VENDOR AND PURCHASER, 3.

RENTS AND PROFITS.

See SHERIFF'S SALE, 5, 8.

REPEAL.

See STATUTES, 3.

REPLEVIN.

1. In an action before a justice of the peace, for the recovery of personal property, the complaint must allege, that the property sought to be recovered, has not been taken by virtue of an execution, or other writ, &c.; must be verified by affirmation, or affidavit; and a bond must be filed before the writ issues; otherwise the Court has no jurisdiction of the cause.—*Dowell et al. v. Richardson*, 573.
2. A verdict in favor of the plaintiff, in replevin, is bad for uncertainty, if the Court cannot determine from it what property the jury intended to find belonged to him.—*Ibid.*

REPLY.

See PLEADING, 2, 3, 6, 16, 21, 24, 25.

REPRESENTATIONS.

1. Where a bidder at sheriff's sale prevents others from bidding, by representations touching the object of his bid, and buys the property at a price much below its value, the sale is void, as against public policy.—*Gilbert v. Carter*, 16.
2. But where no person was influenced by such representations, except the attorney of the execution-plaintiff, and it did not appear that he would have bid more than enough to cover the debt, a sale for the amount of the debt was held valid, though that amount was much less than the value of the property.—*Ibid.*
3. The representation in this case was, that the bidder wished to purchase the property for the use of the execution-defendant and his family; but the statement was not reduced to writing. There was no contract or understanding between the purchaser and the execution-defendant, nor did the latter advance any part of the purchase-money, nor was there any proof of fraud. *Held*, that no trust was created.—*Ibid.*

4. A party is presumed to know the contents of an instrument which he signs, and has, therefore, no right to rely upon the statements of the other party as to its legal effect.—*New Albany, &c., Railroad Co. v. Fields*, 187.
5. It cannot be said that the market value of a commodity is peculiarly within the knowledge of one person more than another, as the channels of information are equally open to all; and a party to a contract of sale of a marketable commodity, has no right to rely upon the representations of the other party touching the market value of that commodity.—*Cronk v. Cole*, 485.

See CORPORATIONS, 17; FRAUD.

As Inducement to Marriage.] See HUSBAND AND WIFE, 4, 5.

RESCISSION OF CONTRACT.

See CONTRACT, 1, 2, 4.

RESERVED CASE.

In deciding a reserved case, the Supreme Court cannot look beyond the question of law reserved in the Court below.—*Lagow et al. v. Neilson*, 183.

RESIDUARY LEGATEES.

See SETTLEMENT OF DECEDENTS' ESTATES.

RESIGNATION.

Of Office.] See OFFICE, 1 to 5.

RETAILING SPIRITUOUS LIQUORS.

An information under the liquor act of 1853 must negative that the defendant had a license to sell.—*Hove v. The State*, 423.

See LIQUOR CASES.

RETURN.

See RECOGNIZANCE, 5; SHERIFF'S SALE, 1 to 4.

REVERSAL OF JUDGMENT.

See COSTS, 1, 2; PRACTICE, 6.

RIGHT OF ENTRY.

On breach of Condition Subsequent.] See COVENANT, 5.

RIOT.

The information in this case charges several persons, naming them all, with a riot. They took their trial separately. Upon the trial of the appellant, the Court instructed the jury that if the defendant and more than one other person entered the house, &c., he must be found guilty. *Held*, that this was error.—*Hardebeck v. The State*, 459.

ROADS.

See WAYS.

RULE FOR ANSWER.

See PRACTICE, 14.

RULES OF THE SUPREME COURT.

Rule 30.]

See BILL OF EXCEPTIONS, 1, 7.

Rule 28.]

See BRIEFS.

S.

“SAID.”

The Word.]

See INDICTMENT, 1.

SALARY.

See *Cowdin v. Huff*, on p. 85.

SALE.

See EMBLEMENTS, 1; FRAUDS, STATUTE OF, 2.

Of Deposit with Warehouseman.] See BAILMENT, 4.

Of Real Estate.] See CONVEYANCE; FRAUDS, STATUTE OF, 1; HUSBAND AND WIFE, 9; MORTGAGE, 6; SHERIFF'S SALE; TRUSTS.

SCHEMES FOR DIVISION OF PROPERTY.

See LOTTERY.

SCHOOLS.

1. Section 1 of ch. 87 of the Acts of 1855, authorizing incorporated cities and towns to establish public schools within their respective corporate limits, and to levy and collect taxes for their support, is unconstitutional.—*The City of Lafayette et al. v. Jenners*, 70.

2. But the constitutional restraint applies only to taxation to pay for tuition: municipal corporations may be authorized to levy and collect taxes to build school-houses; but it seems that in such case the assessment should be for the specific object.—*Ibid.*

See TAXES, 1, 2, 3.

Schemes in aid of.]

See LOTTERY, 2, 3.

SCHOOL-HOUSES.

It is for the township trustees to determine where school-houses are necessary and convenient; and a contract by the trustees for the building of a school-house is binding on the township, though one of the trustees protested against it.—*Crist v. Brownsville Township*, 461.

See SCHOOLS, 2; TAXES, 1, 2, 3.

SCRIP.

See DAMAGES, 1.

SECONDARY EVIDENCE.

See EVIDENCE, 3.

SEPARATE PROPERTY OF WIFE.

See HUSBAND AND WIFE, 2, 6 to 9; WILLS, 2.

SEPARATE TRIAL.

See CRIMINAL LAW, 6, 16; RIOT; WITNESS, 1, 7, 8.

SET-OFF.

1. A set-off unaccompanied by a bill of particulars cannot be pleaded by way of amendment to the answer.—*Ferry v. Jones*, 226.
2. Suit upon a note and account. Answer, a set-off for damages done by plaintiff to defendant, while tenant on defendant's farm, in farming the land in an unskillful manner. *Held*, that the set-off was bad on demurrer; the terms of the contract of renting should have been set out, and the acts of omission specified.—*Stockton v. Graves*, 294.
3. In a set-off, the claim for damages should be set out with as much certainty, as in a cross action for them.—*Ibid*.
4. In a suit by *A.* against *B.*, the defendant cannot plead a note executed by *A.* and *C.* jointly, as a set-off.—*Blankenship v. Rogers*, 333.
5. Touching the mutuality of the debt sued on, and that pleaded as a set-off, the code does not change the law.—*Ibid*.

See PLEADING, 20; RECOURPMENT.

SETTLEMENT AND DISTRIBUTION OF DECEDENTS' ESTATES.

1. By the proviso of § 116, 2 R. S. p. 275, a suit by residuary legatees will lie in the Common Pleas, to set aside the settlement of an estate for a mistake by the executor in failing to account for money.—*Camper et al. v. Hayeth et al.*, 528.
2. But not for money paid to the widow, which neither the will nor the law allowed her. The only remedy, in such case, is an appeal to the Circuit Court, as provided by the first clause of the same section.—*Ibid*.
3. That statute was intended to protect the executor or administrator from suits, except for mistake or fraud, where the order making a final settlement was not appealed from.—*Ibid*.
4. Sections 138 and 139, 2 R. S. p. 280, apply to cases where distribution is to be made to *heirs*, and not to a case where it is to be made to residuary legatees.—*Ibid*.

See EXECUTORS AND ADMINISTRATORS.

SHAM DEFENSE.

See PLEADING, 14.

SHERIFF.

See EXECUTION, 3, 5; SHERIFF'S SALE.

Action on Official Bond of.]

See ACTION, 2.

May Accept Bail.]

See RECOGNIZANCE, 2.

SHERIFF'S SALE.

1. A sheriff's return to an execution levied upon real estate, is admissible in evidence to prove the levy, sale and payment of the purchase-money, though it does not affirmatively state that the property was appraised.—*Thurston et al. v. Barnes*, 289.
2. The fact that the return states that the property was sold to the highest bidder, does not admit the inference that there was no appraisement.—*Ibid*.
3. It is only when property levied upon remains unsold, that the sheriff is required to return the appraisement with the execution; and even then, it need not be indorsed on the execution.—*Ibid*.
4. Where the property is sold, and the return does not show that it was appraised, an appraisement may be proved.—*Ibid*.
5. Where the rents and profits for seven years were offered, and there was no bidder—*held*,

that the sheriff was not required to offer a shorter term. *Aliter*, if he had received a bid.—*Ibid*.

6. In a suit by a mortgagor upon the official bond of a sheriff, for a penalty and damages under the statute of 1843, the first breach assigned in the complaint alleged that, on decree of foreclosure, the sheriff sold the property without giving the notice required by law. The defendants demurred, assigning for causes, 1. That there is no averment that the property sold was, at the time of the sale, the property of the relator. 2. That the statute gives no penalty.

Held, first, that it is presumed that the mortgagor was the owner of the premises at the time the mortgage was executed; and if he afterwards sold his equity of redemption, that was matter to be alleged affirmatively by the defendants.

Second, that § 427, R. S. 1843, p. 751, gives a penalty; and that section is not repealed by § 14, R. S. 1843, p. 1047, according to the provision in § 21, R. S. 1843, p. 1028; nor was it repealed by ch. 54 of the Acts of 1849; and as the suit was commenced prior to May 6, 1853, the penalty was saved by § 2 of the general repealing act of 1852, 1 R. S. p. 431.—*The State ex rel. Robinson v. Leach et al.*, 308.

7. The third breach alleged that the whole property was sold, when a part would have been sufficient to pay the debt, and that the property was susceptible of division. Demurrer, assigning for cause, that there was no averment that the relator requested a division. *Held*, that by § 413, R. S. 1843, p. 749, if the property was divisible, the sheriff could not sell more than was necessary to discharge the debt; and the sheriff is presumed to have known whether the property was susceptible of division.—*Ibid*.

8. The second breach alleged that the property was sold in fee simple, although the rents and profits for seven years had been appraised for more than was due on the execution, including all costs. Demurrer, assigning for cause that the sale was void. *Held*, that the sale might be void, and yet the relator could recover; that it was the duty of the sheriff, on failure to receive a sufficient bid for the rents and profits, to proceed as in case of other property, and the sale of the fee simple was a wrongful and unlawful act; and where a sheriff in the discharge of an official duty is guilty of a wrongful and illegal act which results in damage, he and his sureties are responsible.—*Ibid*.

See REPRESENTATIONS, 1, 2, 3; VENDOR AND PURCHASER, 1.

SIGNATURE.

See LEASE; REPRESENTATIONS, 4.

Of Judge to Record.]

See PRACTICE, 8.

To Tax List.]

See TAXES, 4.

SLANDER.

1. Action for slander, in charging the plaintiff with larceny. Answer, 1. Admitting the speaking of the words, and justifying. 2. Matter in mitigation of damages. Reply, denying the mitigating facts generally. There was nothing in the complaint charging special damages. *Held*, that the words being actionable in themselves, malice is presumed; that, until the defendant had offered evidence to sustain the affirmations in the answer, there was no necessity for the plaintiff to produce any testimony; that the general question of damage to the character of the plaintiff, was a question for the jury, that such character is presumed to be good; that in the issues tendered, the speaking of the words being admitted, without evidence from either side, the jury would have been prepared to consider of their verdict; that evidence to sustain a justification of the speaking, or to mitigate the damages, must have come from the defendant.—*Gaul et ux. v. Fleming*, 253.

2. Suit for slander. The words alleged to have been spoken of the plaintiff were as follows:

"She [meaning said *Mary*] is out gathering up news. She [meaning said *Mary*] has run all over the neighborhood telling tales on my [meaning defendant's] family. She [meaning said *Mary*] can talk as much as she pleases. Thank *God* if my [meaning defendant's] daughters did have bastards, they [meaning defendant's daughters] never had pups. She [meaning said *Mary*] did have pups in *Ohio*, and it can be proved. She [meaning said *Mary*] had two pups by a haystack,"—thereby meaning that she had been guilty of bestiality, or the crime against nature, &c. Demurrer sustained. The objections to the complaint were, 1. That the innuendo is in the disjunctive, in that it alleges an intention to charge bestiality or the crime against nature. 2. That the words charge an impossible crime and an impossible fact.

Held, first, that both sodomy and bestiality may be embraced by the term "crime against nature;" but that sodomy is generally meant by the use of that term.

Second, that the first objection is invalid; for an inference expressed in the colloquium or innuendoes in a complaint for slander, if not correct from the words averred to have been spoken, cannot affect the sufficiency of such averment.

Third, that the Court cannot say that sexual connection between a dog and a woman is impossible, nor that if possible, conception might not follow; but if such connection and conception are impossible, it is not known to the people; and the people, though bound to know the law, are not bound to know philosophy or the facts and principles of science: hence, the injury to the plaintiff would not be affected by the truth or falsity of such facts or principles.—*Ausman et ux. v. Veal*, 355.

3. *Snyder v. Degant*, 4 Ind. R. 578, overruled.—*Ibid*.

SODOMY.

See SLANDER, 2.

SPECIAL CONTRACT.

See ACTION, 3, 4, 5.

SPECIAL DENIALS.

See PLEADING, 8.

SPECIFIC PERFORMANCE.

Where a parol contract for the conveyance of real estate is fair in all its parts, is certain, is for a valuable consideration, does not interfere with the rights of creditors, and is capable of being performed, the Courts will generally decree a specific performance.—*Stater et al. v. Hill*, 176.

See VACATION OF JUDGMENT; WITNESS, 4; *Benner v. Benner*, 256.

STAKEHOLDER.

See WAGER.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTES.

1. The printed statute-book of another state of the *Union* is not evidence in this state, unless it purports to have been printed under the authority of such state.—*Mages v. Sanderson*, 261.

2. Statutes in restraint of personal liberty must be strictly construed, with reference to the current of judicial decision, and to the practice existing at the time of and before their adoption.—*Ramsey et al. v. Foy*, 493.
3. The reenactment of a former section of a statute in a later section, is not necessarily a repeal of the former section.—*Martindale et al. v. Martindale*, 566.

See WILLS, 1.

Construed.] See BANKS AND BANKING, 3; COMMON PLEAS, COURT OF; CORPORATIONS, 1, 5; COSTS, 4; COUNTY COMMISSIONERS, BOARD OF, 1; CRIMINAL LAW, 4, 9; HUSBAND AND WIFE, 7; INDICTMENT, 6; JUDGMENT, 6; LIMITATIONS, 3; LOTTERY, 3; OFFICE, 6; PARTIES, 1; PLEADING, 10; SETTLEMENT, &c., OF DECEDENTS' ESTATES; SHERIFF'S SALE, 6; TAXES, 3; VACATION OF JUDGMENT.

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STOCKHOLDER.

See CORPORATIONS, 6, 8, 15; RAILROAD COMPANY, 19 to 22; SUBSCRIPTION OF STOCK.

STOCKS.

Deposited by Bank.]

See AUDITOR OF STATE.

STORAGE.

See BAILMENT.

SUBSCRIPTION OF STOCK.

1. In this case a written subscription of stock in a railroad company was shown to have been conditional by parol evidence. Notice had been given, and an order of Court made, to obtain the production of the subscription on the trial; but it was not produced. The question as to the admissibility of such evidence was not presented in this Court. *Held*, that the evidence was entitled to full weight.—*Jewett v. The Lawrenceburgh, &c., Railroad Co.*, 539.
2. The condition in the subscription in this case was, that the road should be located within 20 rods of *St. Omer*. *Held*, that the meaning was, that the road should be constructed to run within 20 rods of *St. Omer*.—*Ibid*.
3. Where a subscription is made upon such a condition, the subscriber is not a stockholder, and consequently not liable upon his agreement, until the condition is performed; and whether it has been performed is a question of fact.—*Ibid*.
4. Where a conditional subscription was paid, by the transfer of land to the company, before the condition was performed, and the company failed to construct the road according to the condition, but transferred the land to an innocent purchaser,—*held*, that in a suit by the subscriber against the company, the measure of damages would be the value of the land at the time it was transferred to the company.—*Ibid*.

5. And where the complaint alleged that the company after failing to perform such condition, appointed commissioners to settle with the plaintiff and others similarly situated, who, after an examination on behalf of the company, executed and delivered to the plaintiff an agreement that the company should refund the amount paid on the subscription, with interest, &c.:—*Held*, that the plaintiff might prove the amount of such conditional stock subscribed by others; the amount paid in; the acts of the commissioners in awarding repayment of such amounts to other conditional subscribers; and the payment by the company of the sums so awarded.—*Ibid*.

See CORPORATIONS, 1, 2, 6, 11 to 15; EVIDENCE, 5, 6, 15; RAILROAD COMPANY, 18 to 22;
The Ohio Insurance Co. v. Nunemacher, 234.

SUMMONS.

1. A summons cannot, under the code, be issued upon a *præcipe*; nor can it issue before the complaint is filed.—*Mills et al. v. The State ex rel. Barbour et al.*, 114.
2. Where a summons has been issued upon a *præcipe*, the error might be waived by appearance without a motion to quash or set aside the summons; but appearance after judgment by default, and making an ineffectual motion to set aside the default, will not operate as a waiver of the error.—*Ibid*.

SUPERVISOR.

See WAYS, 4.

SUPREME COURT.

1. There are two terms known to the constitution and statutes of this state; for which the office of judge of the Supreme Court may be held: 1. A term by election, of six years. 2. A term by appointment, for the time intervening between the appointment and the qualification of the person elected at the general election next succeeding the appointment.—*Biddle v. Willard*, 62.
2. Such judges must be elected, 1. Where there is an existing vacancy. 2. Where an appointee is occupying the office. 3. Where the term for which an incumbent was elected will expire before another election.—*Ibid*.

See PRACTICE IN THE SUPREME COURT, for references.

SURETY.

See PROMISSORY NOTES, 5, 6.

SURETY OF THE PEACE.

An affidavit for surety of the peace is not bad for being in the alternative as to the injuries feared.—*The State ex rel. Fisher et al. v. Bridegroom*, 170.

SURPLUSAGE.

See PLEADING, 28.

SURPRISE.

By Testimony.]

See NEW TRIAL, 6, 8.

T.

TAXES.

1. Section 9 of the school law of 1855, empowering township trustees to raise taxes to build school-houses, is constitutional.—*Rose et al. v. Bath Township et al.*, 18.
2. The power must be exercised strictly within the statutory limits.—*Ibid.*
3. By the school law of 1855, township trustees cannot levy a tax of more than 25 cents on each 100 dollars for the erection and repair of school-houses; but they may levy an extra tax to pay a debt contracted under the school law of 1852.—*Wayne Township et al. v. Alexander*, 221.
4. Information for refusing to swear to a list of taxables as prepared by the assessor, &c. The information did not set out either the substance or tenor of the list to which the defendant was required to swear; nor does it contain an allegation that he had signed it. A motion to quash was sustained. *Held*, that this was correct.—*The State v. Lenfesty*, 397.

See SCHOOLS; *The City of Lafayette et al. v. Jenners*, 70, 74.

TENANTS IN COMMON.

See ESTOPPEL.

TENDER.

See CORPORATIONS, 14; EVIDENCE, 5, 6.

TERMS OF ART.

See EVIDENCE, 1.

TIMBER.

Destruction of.]
Clearing Land.]

See CRIMINAL LAW, 18.
See CUSTOM, 4.

TITLE TO REAL ESTATE.

Issue upon.]

See PLEADING, 16.

TOLL.

See PLANKROAD COMPANY.

TORTIOUS TAKING.

See EXECUTION, 5; PERSONAL PROPERTY.

TOWNSHIP TRUSTEES.

See SCHOOL-HOUSES; TAXES, 1, 2, 3; WAYS, 1.

TRANSCRIPT.

See APPEAL, 3.

TRAVERSE.

See PLEADING, 24.

TRESPASS.

See INJUNCTION.

TRIAL.

A trial without an issue is error.—*Carson v. Earlywine*, 423.

TROVER.

See BAILMENT.

TRUSTS.

1. In a doubtful case, a sale of real estate made by trustees of an express trust to one of their number, will be set aside.—*Wallace v. The Associate Reformed Church*, 162.
2. The Courts will scrutinize such transactions, where trustees are parties, with the greatest care, especially where they are promptly brought before a Court, and rights have not intervened affecting the case with hardship.—*Ibid.*

See FRAUDS, STATUTE OF, 2; HUSBAND AND WIFE, 6, 9; REPRESENTATIONS, 3.

TUITION.

See SCHOOLS, 2.

U.

UNCERTAINTY.

See CONTRACT, 4; REPLEVIN, 2.

USAGES.

See CUSTOM.

USE AND OCCUPATION.

See VENDOR AND PURCHASER, 3.

USURY.

See PROMISSORY NOTES, 5.

V.

VACANCY.

See OFFICE; SUPREME COURT, 2.

VACATION OF JUDGMENT.

Suit to enforce the specific performance of a contract for the sale of real estate. The action was founded upon a title-bond, whereby the obligor agreed to convey the land, on the payment of a certain sum of purchase-money, with interest. The land was held in trust for the obligee, and the bond sued on was made in consideration of that trust. The obligee having died, his widow and sole heir tendered the purchase-money and demanded a conveyance, which being refused, she brought this suit. The Court found for the plaintiff, and adjudged that the defendant convey the premises, &c. The next day after the judgment, the defendant moved the Court to vacate the judgment and grant a new trial, under § 601, 2 R. S. p. 167. The motion was overruled. *Held*, that this was not error; that the case is not within any of the provisions of §§ 592, 601, 611, 612, 2 R. S. art. 29, p. 167.—*Benner v. Benner*, 256; *Perry v. Ensley et ux.*, 378.

See JUDGMENT, 9; PRACTICE, 4; *Robertson v. Bergen*, 402.

VARIANCE.

1. A variance amendable in the Court below, will be deemed to be amended in the Supreme Court.—*Warbritton v. Cameron*, 302.
2. There is not a fatal variance between the names *Charlestown* and *Charleston*. The names are *idem sonans*.—*Alvord et al. v. Moffatt*, 366.
3. Writ issued in the name of *Taylor* and *Embree*, plaintiffs. Complaint filed in the name of *James Taylor* and *Jesse Embree*, partners under the name of *Taylor* and *Embree*, against the defendants. The defendants moved to dismiss the suit for the variance. The Court overruled the motion. The issues were then made up. Trial; and judgment rendered for the plaintiffs. On appeal, the judgment was affirmed.—*Dunkin et al. v. Taylor et al.*, 422.

See PROMISSORY NOTES, 10.

VENDOR AND PURCHASER.

1. The purchaser at sheriff's sale of land to which the execution-debtor has no title, can recover from the debtor the amount of the purchase-money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor.—*Pennington et al. v. Clifton*, 172.
2. The complaint, in such case, need not allege a demand.—*Ibid.*
3. Nothing can be recovered for use and occupation or for rent, where the premises were occupied under a contract of purchase, and that contract had been rescinded, and the property received back by the vendor.—*Miles v. Elkin et al.*, 329.

See CONVEYANCE; FRAUDS, STATUTE OF, 1.

Of Personal Property.] See DEMAND; FRAUDS, STATUTE OF, 2; MORTGAGE, 1, 2.

VENUE.

1. In an action to recover real estate, the defendant moved for a change of venue and filed his affidavit alleging that the plaintiff had an undue influence over the citizens of the county, and that an odium attached to him, affiant, on account of local prejudice, &c. Held, that the affidavit was sufficient to sustain the motion.—*Shaw v. Hamilton*, 182.
2. Suit in the Common Pleas upon promissory notes. The defendant answered, denying the jurisdiction of his person, because he was a brother of the judge. Upon a review of the statutes, held, that the objection should have been taken by way of application to change the venue.—*Kelly v. Hocket et al.*, 299.
3. Held, also, that the fact that it was the defendant—the party objecting—to whom the judge was related, made no difference.—*Ibid.*

See JURISDICTION, 4.

VERBAL RESERVATION.

See CONVEYANCE.

VERDICT.

See JUDGMENT, 8; JUDGMENT NON OBSTANTE VEREDICTO; JURY, 5; NEW EXAMAT, 3; NEW TRIAL, 9, 10; PRACTICE, 1, 15; PROMISSORY NOTES, 9; REPLEVIN, 2.

W.

WABASH AND ERIE CANAL.

Bridge upon.]

See *The Board of Trustees, &c. v. Mayer*, 400.

WAGER.

1. A party to a bet may recover from the stakeholder the amount deposited in his hands, if he notify him not to pay it over while it is yet in his possession.—*Alexander v. Mount*, 161.
2. If after such notice the stakeholder pay the wager to the winner, the loser need not make a demand before suit.—*Ibid.*

WAGES.

See *Cowdin v. Huff*, on p. 85.

WAREHOUSEMEN.

See BAILMENT.

WARRANTY.

See PROMISSORY NOTES, 15.

WAYS.

1. Landholders cannot erect gates upon the township highways, as contemplated by § 35, 1 R. S. p. 314, unless the township trustees authorize it by providing the proper regulations.—*Henby v. The Trustees, &c.*, 45.
2. The use of land for a highway for such a length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, is sufficient to raise a presumption that the owner intended a dedication to the public.—*The State v. Hill*, 219.
3. It is not necessary under our statute that the highway should have been established by authority.—*Ibid.*
4. Where a road was, by order of the proper authority, located on a line between two farms—so far as such order could make a location—but was in point of fact, opened, worked and used for twenty-seven years on one side of that line, wholly on the land of one of the proprietors,—*held*, in a prosecution for malicious trespass, that the original order would not, at that length of time after it was made, confer upon the supervisor the authority, under our statutes, to open the road upon the line.—*Lemasters et al. v. The State*, 391.

See RAILROAD COMPANY, 13.

WIDOW.

See DOWER; JURY, 3; SETTLEMENT, &C., OF DECEDENTS' ESTATES, 2; WITNESS, 4.

WILLS.

1. *It seems*, that a general statute giving power to make wills, will not be construed to embrace persons under common-law disabilities.—*Reese v. Cochran*, 195.
2. *Quære*, whether a married woman can dispose of her separate property by will.—*Ibid.*
3. This case turns upon the construction of a will. And as the entire will was not copied into the record, the Court would not give an opinion as to the correctness of the ruling below.—*Copeland v. Copeland et al.*, 341.
4. By § 36, 2 R. S. p. 317, a foreign will, or a copy and probate thereof, cannot be used in evidence in the Courts of this state, unless it has been first produced to the Common Pleas, and by that Court directed to be filed and recorded.—*Thieband v. Sebastian*, 454.

See DESCENT; SETTLEMENT, &C., OF DECEDENTS' ESTATES.

WITCHCRAFT.

Belief in.]

See CONTRACT, 9.

WITNESS.

1. Five persons were prosecuted for a riot. One of them demanded to be tried separately. On his separate trial he offered one of his co-defendants, who was willing to testify, as a witness. He was sworn, but objection being made by the prosecutor, his testimony was excluded by the Court. *Held*, that this ruling was erroneous; that the third specification of § 90, 2 R. S. p. 372, makes accomplices competent witnesses when they consent to testify, and gives a defendant upon trial separately, as in this case, the right to the testimony of his co-defendant who is not yet upon trial.—*Hunt v. The State*, 69.
2. But what weight is to be given to the evidence, is a question for the jury.—*Ibid*.
3. The defendant, in this case, claimed as a set-off the amount of a note made jointly by the plaintiff and himself, alleging that he, defendant, was only surety, and that he had paid the whole note. To prove this, he called the plaintiff as a witness. Plaintiff testified that defendant had paid the note, and then went on to testify to a series of arrangements between him and defendant, by which he had satisfied the latter. Defendant then offered himself as a witness touching these further facts, but he was rejected. *Held*, that he should have been admitted.—*Draggoo v. Draggoo*, 95.
4. Suit to compel the specific performance of a bond for the conveyance of land, brought by the heirs of the obligee. The bond had been destroyed, and a new one executed in its place to the widow and heirs. The widow had released her interest. It was alleged that the obligor had fraudulently procured the destruction of the original bond, and substituted the new one, different in its terms. *Held*, that the widow was admissible as a witness to prove the contents, execution, delivery and destruction of the lost bond.—*Carpenter v. Dame et al.*, 125.
5. The question of mental capacity goes to the competency of a witness, and is for the Court; but, *quære*, whether, if the Court should hold the witness competent, and he should testify, the opposite party might be permitted to prove actual incompetency, or a weakness in a given faculty, or in all the faculties, to affect his credibility, though such proof might not be sufficient to exclude the witness.—*Ibid*.
6. In a suit to cancel a deed, and for the recovery of real estate and damages for detaining it, one of the defendants, before the commencement of the trial, made oath that he had released his interest to his co-defendants, filing a quitclaim deed as evidence of the fact. On the trial, his co-defendants, offered him as a witness, but the Court excluded him. *Held*, that this was not error.—*Dearmond et al. v. Dearmond*, 191.
7. Prosecution for malicious trespass against five persons. All the defendants being on trial, one of them was offered as a witness in behalf of the others. His testimony being objected to, was excluded. *Held*, that this was not error.—*Lemasters et al. v. The State*, 391.
8. *Aliter*, if the defendants had taken their trial separately.—*Ibid*.

See DEPOSITIONS, 6, 7; GUARDIAN AND WARD, 3; NEW TRIAL, 11; PARTIES 8.

Opinion of.]

See RAILROAD COMPANY, 7, 29.

WRIT.

See NE EXEAT; REPLEVIN; VARIANCE, 3.

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Y.

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E. R. T. C.

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